

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TIMOTHY WHITE,)
)
Plaintiff,)
)
vs.) 3:11-CV-1817-B
)
REGIONAL ADJUSTMENT)
BUREAU, INC., d/b/a)
RAB, INC.,)
)
Defendant.)

JURY TRIAL - VOLUME 3
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
FEBRUARY 27, 2013

A P P E A R A N C E S

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1 (In open court at 9:09 a.m.)

2 THE COURT: Good morning. For the record,
3 this is Civil Action 3:11-CV-1817, Dr. Timothy White
4 v. RAB.

5 We are here on the second day of trial. I
6 see defense counsel is here. I see Dr. White,
7 plaintiff, is here. I do not see counsel. Everyone
8 was directed to be here by 8:00. It's ten after
9 nine.

10 Dr. White, do you know what's going on?

11 DR. WHITE: I don't, Your Honor. I left
12 several messages for Mr. Radbil. I apologize. I
13 don't know the circumstances.

14 THE COURT: Did you have a chance to
15 confer with him last night? I mean just in any way
16 that might indicate there was something that might
17 get in the way with him getting here on time today?
18 And I will ask you to stand up, because you talk
19 softly, and it's hard to hear you.

20 DR. WHITE: Oh, I'm sorry.

21 No, quite the opposite. We agreed to meet
22 at 7:00. He wasn't here. I was actually early to
23 meet at 6:30. I've left him several messages.

24 THE COURT: Here at the courthouse?

25 DR. WHITE: Yes.

1 THE COURT: And you got nothing from him?

2 DR. WHITE: Yes. And I let him know I was
3 coming directly to the courtroom.

4 THE COURT: And you have been dealing with
5 him for quite some time, have you not?

6 DR. WHITE: Yes, Your Honor.

7 THE COURT: And have you ever had this
8 kind of an issue?

9 DR. WHITE: No, only when the trial
10 started, he has been late on more than one occasion;
11 not prior to that, though.

12 THE COURT: Okay. Thank you. Again, I
13 apologize. You deserve competent counsel, as does
14 everyone in a trial. I've been real concerned in
15 this case for you.

16 Let me hear from Ms. Malone.

17 MS. MALONE: Your Honor, I actually do
18 have a concern, and I would not ordinarily tell the
19 Court of this, but I think I have an obligation to
20 do so.

21 In the beginning of this case -- it was
22 filed originally in July of 2011. After we received
23 service of the lawsuit, I contacted the firm, the
24 plaintiff's firm and asked them for a settlement
25 demand and received a response from them, which is

1 very unusual, which was they were not interested in
2 discussing settlement.

3 In October of 2011, we made a significant
4 offer of judgment to Mr. Radbil's firm, specifically
5 for the entire maximum statutory award that
6 Mr. White would be entitled to, as well as all
7 attorney's fees as of that date.

8 I spoke with Mr. Radbil yesterday. I
9 tried to talk to him about the charge. He wasn't
10 interested. When I had him on the phone --

11 THE COURT: This was after court.

12 MS. MALONE: Yes, ma'am, it was about ten
13 minutes to nine last night.

14 I asked Mr. Radbil, I said, after the
15 judge's discussion, I'm surprised you don't want to
16 talk settlement to me, to which he responded he did
17 not.

18 And I said, Mr. Radbil -- I said, Noah, to
19 be honest with you, Judge. I said, Noah, you do
20 understand that because we made an offer of
21 judgment, if we win on the issue of the actual
22 damages on anything else in front of the jury, your
23 client could, in fact, be exposed to a judgment for
24 our attorney's fees. And he said he was not
25 interested in discussing settlement.

1 We have had two other cases in state
2 court, Your Honor, and I apologize I did not bring
3 the transcripts, where we've become aware that
4 Mr. Radbil did not relay offers of judgments or
5 settlements to his client. I am concerned that
6 Mr. White does not know that an offer of judgment
7 was made or that there could be a risk of a judgment
8 entered against him in this kind of a case.

9 THE COURT: Dr. White, you've got counsel.
10 He's not here, and he's acting way out of the
11 ordinary since this trial started. You don't have
12 to talk to opposing counsel since you're represented
13 by counsel.

14 Under the circumstances, I would just say,
15 it's up to you if you would like to talk to them
16 without knowing where he is. He's an hour and 15
17 minutes late on the day of a jury trial with the
18 jury going to be here soon. And if you want to
19 answer this question, fine. If you don't, I
20 understand. But are you aware of anything of the
21 nature of what Ms. Malone just described, this offer
22 of judgment rule and how it might bind you
23 potentially?

24 DR. WHITE: No, Your Honor, I was not.

25 THE COURT: That's all right.

1 DR. WHITE: No, I was not.

2 THE COURT: Okay. We are in a bind here
3 with a jury trial. And I can't -- I don't know of
4 any reason to declare a mistrial, but that would
5 make more expense and burden further the defendants,
6 who have pretty much followed the rules so far, and
7 I know you have, too. I know this has been a
8 difficult situation for you, as well.

9 You are the only one that can decide if
10 you want to talk to them in this situation without
11 counsel. I would say under the circumstances I see
12 no legal or ethical barriers or nor would I support
13 any kind of sanctions against defense for bringing
14 this up and talking to you under these circumstances
15 so that they are protected down the road.

16 It seems to me you may want to talk to
17 them, but I will leave that up to you. We have to
18 do something today though. We have to go forward
19 with the jury trial with or without him.

20 So do you want -- do you want -- I will
21 give you a few minutes to maybe try to call him
22 again and then let me know if you want to talk to
23 Ms. Malone.

24 DR. WHITE: I can do that. And again, I
25 apologize. I'm embarrassed, actually mortified, you

1 know, by the circumstances.

2 This is a huge inconvenience to the Court,
3 and I apologize to Ms. Malone and Mr. Wyatt. I'm
4 really not aware of what's going on with Mr. Radbil.
5 I didn't -- you know, I didn't dial a lawyer. I
6 contacted a student loan advice website and -- over
7 a number of months, actually, and was referred to
8 this law firm. Everything seemed to be square.
9 Everything seemed to be legitimate. I'm not an
10 attorney, but, you know, they seemed to know what
11 they were doing, and I'm sorry that this has
12 happened. I'm happy to apologize to the jury, too.

13 THE COURT: I don't think you need to do
14 that. I don't think there's any indication that you
15 have done anything that caused any of this. His
16 conduct has been way off the charts in terms of --
17 well, you saw what happened yesterday. Even a lay
18 person could see what was going on with what he was
19 attempting to do and then seems to have no basis for
20 what he was saying. I don't know if that's why he
21 is not here or not.

22 But he has a responsibility as a licensed
23 attorney to stand up for you, to get through this
24 case, good or bad. And if he's abandoned that
25 today, that is a big problem. But the bigger

1 problem facing us is, we are in the middle of a jury
2 trial. I couldn't, in my view, put defense through
3 another trial because of what Mr. Radbil is doing.

4 Perhaps you can call a friend or get some
5 advice, but I would like for you to come to an idea
6 if you think you can come to some agreement with
7 defense, with or without Mr. Radbil, so we don't
8 have to go forward with this jury trial without your
9 attorney, because I will go ahead with it. We have
10 no idea where he is. Okay? Let me give you about
11 15 minutes to sort of think it through. All right?

12 DR. WHITE: Thank you, Your Honor.

13 THE COURT: Ms. Malone, anything else?

14 MS. MALONE: Yes, Judge. This is really
15 uncharted waters for me, so I'm not really sure
16 what to do.

17 During the course of this case, we were
18 provided with a copy of the attorney-client
19 agreement that Mr. White signed with that law firm.
20 And there is a clause here that I think is maybe
21 problematic for Mr. White, and I think it's been
22 waived by the law firm, which is that, if he makes
23 an agreement with us and they don't get their
24 attorney's fees, that he could be subject to paying
25 their attorney's fees. But when they abandon him at

1 trial, I don't see how they can enforce that.

2 Frankly, I don't think this is compliant
3 with Texas law, but, you know, I'm not in that
4 position of doing that. I would think that the
5 Court, under the circumstances of recognizing that
6 Mr. Radbil is not here and his behavior in the
7 trial, would give Mr. White some protection if he
8 did want to resolve the issue with us.

9 THE COURT: Under the circumstances, I
10 would absolutely give you protection from what --
11 what Ms. Malone has described as this clause in this
12 particular contract. And if you can hand that to
13 Ms. Woodward. Let me make a copy of that so we have
14 it.

15 And let me go ahead and say for the record
16 that, as to the motion under Rule 50 with regard to
17 the telephone collection -- Telephone Protection
18 Act, 47, I believe it is -- 47 U.S.C.

19 227(b)(1)(A)(iii), I grant the Rule 50 motion for
20 the following reasons -- so that means that that
21 claim is out of the case. This was going to happen
22 whether your attorney was here or not, Mr. White. I
23 just needed to do some additional research based on
24 hearing the arguments yesterday.

25 So just basically, defense counsel has

1 made a motion for judgment as a matter of law under
2 Federal Rule of Civil Procedure 50(a). Rule 50(a)
3 permits relief as a matter of law where a party has
4 been fully heard on an issue during a jury trial and
5 the Court finds that a reasonable jury would have a
6 legally sufficient evidentiary basis to find for the
7 party on that issue.

8 Section 227(b)(1)(A)(iii) of the TCPA
9 prohibits an entity from making any call, using any
10 automatic telephone dialing system or an artificial
11 or prerecorded voice to any telephone number
12 assigned to a paging service, cellular telephone
13 service, specialized mobile radio service, or other
14 radio common carrier service, or any service for
15 which the called party is charged for the call.

16 47 U.S.C. Section 227(b)(1)(A)(iii) --
17 this is a cite -- the federal definition of an
18 automatic telephone dialing system is equipment that
19 has the capacity, A, to store or produce telephone
20 numbers to be called using a random or sequential
21 number generator; and B, to dial such numbers.
22 That's in the statute already cited to.

23 In essence to prevail on claim under
24 Section 227(b)(1)(A)(iii), plaintiff must prove that
25 defendant used an automatic telephone dialing system

1 or prerecorded voice to call plaintiff's cell phone.

2 Defendant has moved for judgment as a
3 matter of law on the basis that:

4 One: Plaintiff failed to present evidence
5 that defendant uses an automatic telephone dialing
6 system as defined by federal law;

7 Two: Plaintiff failed to present evidence
8 that defendant used such a system to call
9 plaintiff's cell phone.

10 The plaintiff's response to the argument
11 by defense addressed only the first argument, namely
12 whether defendant operates an automatic telephone
13 dialing system. The evidence presented in the
14 plaintiff's case in chief came solely from the
15 defendant's Director of Compliance and Human
16 Resources and the only witness for that defendant
17 and the only other of two witnesses for the
18 plaintiff, Robert Wyatt.

19 Plaintiff also submitted through Wyatt,
20 Plaintiff's Exhibit 10, which is a printout of the
21 defendant's website.

22 In his testimony and on direct exam, Wyatt
23 stated that the defendant utilizes the Ontario
24 systems guaranteed contacts dialer. He testified
25 that their dialing system does not store numbers to

1 be called, but that each night the number system is
2 wiped clean and each morning defendant must enter
3 the numbers to be called into the dialing system.

4 Defendant's website, Plaintiff's Exhibit
5 10, advertises that he uses a predictive dialer and
6 explains the benefits of using such a dialer. But
7 Mr. Wyatt testified on direct, and then again on
8 cross, that the website contains a mistake -- and
9 that was not contradicted anywhere -- that the
10 defendant dialing system is not a predictive dialer.

11 Mr. Wyatt also testified on cross that
12 regardless of the dialing system it operates, each
13 of the calls to plaintiff -- each of the calls made
14 to plaintiff's cell phone, which are the calls that
15 would underlie the liability under the Texas --
16 under the TCPA, each of those calls to plaintiff's
17 cell phone were dialed manually. There is nothing
18 that refutes that.

19 Mr. Wyatt explained that a manual dial
20 means that the collector physically punched in each
21 of the numbers that make up the plaintiff's cell
22 phone number.

23 Wyatt based his testimony on defendant's
24 account notes, and they were a preadmitted exhibit,
25 which indicate that each call to the cell phone was

1 made manually.

2 Wyatt also testified that, if a call was
3 made using defendant's dialing system, the system
4 would automatically label the call log entry as
5 having been made from the dialing system and that no
6 employee could modify that label.

7 Plaintiff's counsel argues that the
8 defendant's website proves that the defendant has a
9 predictive dialer. Counsel also argued that the FCC
10 has ruled that predictive dialers constitute
11 automatic telephone dialing systems.

12 In a summary judgment briefing, plaintiff
13 had pointed to a case, Lee v. Credit Management, 846
14 F.Supp. 716, Southern District 2012. The Lee case,
15 however -- and in that case they cite to the rules
16 and regulations implementing the TCPA.

17 The Lee case, though, did not decide
18 whether predictive dialers were -- whether or not
19 predictive dialer, the predictive dialer in that
20 case, was an impermissible automatic dialer; nor did
21 it decide whether the predictive dialer was used.
22 The Court merely found that there was an issue of
23 fact.

24 Further, the FCC rules that the Lee case
25 follows merely state that a predictive dialer could

1 be an automatic dialing telephone dialing system
2 when certain computer software is attached or when
3 paired with certain software.

4 Plaintiff next points to, In re: In the
5 Matter of Rules and Regulations Implementing the
6 TCPA of 1991, found at 23 FCC rcd. 559, January 4,
7 2008, wherein the FCC stated in this declaratory
8 ruling: We affirm that a predictive dialer
9 constitutes an automatic dialing system, telephone
10 dialing system, and is subject to the TCPA's
11 restrictions on the use of auto dialers. There is
12 some, then, support that predictive dialers may be
13 automatic telephone dialing systems.

14 Nonetheless, here, on the evidence
15 presented, plaintiff has not presented evidence,
16 anywhere close to adequate evidence, that, even if
17 its system was a predictive dialer -- and they have
18 not established that -- that it had the capacity to
19 store or to produce numbers as required to
20 constitute an automatic dialing system. My
21 recollection was that Mr. Wyatt specifically said
22 that it didn't do that.

23 More importantly, even if plaintiff could
24 argue that its evidence shows that the defendant's
25 dialer was an automatic telephone dialing system,

1 plaintiff neither presented evidence nor
2 contradicted evidence brought out by it during
3 Wyatt's direct examination that the calls made by
4 the defendant to the plaintiff's cell phone were all
5 manually dialed and not dialed using the dialing
6 system.

7 Accordingly, having heard the arguments,
8 done additional research, examining the law and Rule
9 50 standards, the Court finds that plaintiff has
10 been fully heard on this issue with regard to the
11 Telephone Consumer Protection Act, and that -- and a
12 full opportunity, plaintiff has had, to present his
13 evidence on this claim, and concludes that a
14 reasonable jury would not have a legally sufficient
15 evidentiary basis to find for the plaintiff on this
16 TCPA claim. So I grant the motion by the defendant
17 under Rule 50 on plaintiff's TCPA claim. So that
18 claim is out of the case.

19 So what's left, then, are those claims
20 that were ruled in favor of plaintiff on summary
21 judgment to be submitted for potential damages. And
22 then there's that issue with regard to discovery
23 disclosures on damages and how that might curtail
24 how much can be asked for by plaintiff, and one jury
25 issue, and that's under the Fair Debt Collection

1 Practices Act, and that's the collector's call to
2 debtor's employer under 15 U.S.C. Section 1692c.

3 So potentially going to the jury would be
4 that one I just mentioned, the 15 U.S.C. 1692d(6),
5 no disclosure of collector's identity where summary
6 judgment was granted for plaintiff.

7 Under 15 U.S.C. 1692e(11), false means of
8 collection, the February 17th and the March 11th
9 calls, summary judgment under that statute were
10 found in favor of plaintiff, so those are for
11 damages.

12 Under the Texas Finance Code,
13 392.304(a)(4), the February 17th call and March 11th
14 call were found to be in favor on summary judgment
15 of plaintiff, so those claims under the TDCPA would
16 be submitted for potential damages by the -- to the
17 plaintiff.

18 And then the Texas Finance Code,
19 Section 392.304(a)(5)(B), where there is no
20 disclosure of the collector's identity, the February
21 17th call and the March 11th call were found in
22 favor of the plaintiff. I believe that's what's
23 left.

24 So Dr. White, I will give you a chance to
25 try to decide what you want to do. I am going to go

1 forward with this trial, lawyer or not, to the jury.

2 I would strongly advise you to consider
3 talking about -- talking with Ms. Malone about what
4 can be done at this time; that, perhaps, would be to
5 your benefit as opposed to going through the jury
6 trial. So let's give you about 15 minutes or so.
7 All right?

8 DR. WHITE: Okay.

9 THE COURT: Any questions?

10 DR. WHITE: Just one. And I apologize, it
11 seems presumptuous for me -- seems like I'm acting
12 like my own attorney, which I am not in any way.
13 But I felt like I should make a response to the
14 issue of sandbagging yesterday with the claims.

15 I did quantify the damages. And they were
16 not an abstract sum for mental anguish, they were
17 real financial damages that I suffered. I made sure
18 Mr. Radbil had that information. The judge recorded
19 it in the settlement conference, and I was led to
20 believe it would be submitted for this trial, which
21 of course it wasn't. So I apologize."

22 THE COURT: I don't think anyone is taking
23 issue with any of your conduct at all in this case.

24 The idea that the very clear Federal Rules
25 of Civil Procedure, the pretrial disclosure

1 requirements from -- the requirements that begin at
2 the inception of a case all require that some
3 specific amount, if it's going to be requested, be
4 disclosed pursuant to these rules. Disclosing and
5 addressing what you might agree to settle in a
6 mediation, which is confidential and not to be
7 disclosed to anyone, would not be enough, even if
8 your attorney told you that. Even if he gave you
9 that impression, that's not going to be enough to
10 give them the notice they are entitled to under the
11 law to prepare for that proof.

12 DR. WHITE: In fact, his response was that
13 that doesn't need to be submitted, that it's
14 entirely up to the jury, which I know isn't true,
15 because I have served on a jury before where damages
16 were decided. I was the foreman on that jury, and I
17 know you have to have some kind of -- some kind of
18 suggestion of damages. The jury can't be left on
19 their own to decide what somebody's damages are.

20 THE COURT: And there are some parameters
21 on that. But the bottom line is that, in the civil
22 system, everybody gets to be on notice of what
23 everybody else is going to do, especially when it's
24 how much money are you asking for; how much do you
25 say you were harmed; what's your specific amount.

1 And the exceptions to that, if there are any, don't
2 apply here. So no one is faulting you for that,
3 Dr. White.

4 Let's take a break and let you collect
5 your thoughts and see what you want to do. Either
6 way, we are going to have this settled or go with
7 the jury. Under these circumstances, as far as I'm
8 concerned if you haven't heard from Mr. Radbil,
9 unless there's something completely unforeseen, like
10 an accident, he's pretty much abandoned you. And I
11 don't know how to answer that at this stage. He
12 doesn't even have a partner or anyone who has
13 contacted us if something like that has happened.

14 Ms. Malone.

15 MS. MALONE: The only thing I wanted to
16 say on behalf of my client to Dr. White is that we
17 have no ill feelings toward him. We don't want him
18 to think that by any means -- in fact, I told you
19 the issue this morning, because I am concerned as an
20 attorney that I think someone has not been told the
21 information.

22 THE COURT: Okay. Let's have you all talk
23 and see if you can come to some agreement, and we'll
24 go from there.

25 (Recess taken from 9:31 to 10:15.)

1 THE COURT: All right. It's 10:15.
2 Lawyers were to be here at 8:00. Everyone was but
3 Mr. Radbil. Where were you?

4 MR. RADBIL: Your Honor, I was not feeling
5 well. I have food allergies, and I think I ate
6 something yesterday evening shortly after I filed
7 our jury instructions. So I was in my hotel room a
8 block away. I apologize to the Court. I didn't
9 know that it had milk ingredients in it, but that's
10 where I was.

11 THE COURT: Mr. Radbil, we never heard
12 from you until close to ten.

13 MR. RADBIL: When I eat stuff with milk in
14 it, I get sick, so I was not available to call
15 prior.

16 THE COURT: And you agreed to meet your
17 client at 6:00 or something this morning.

18 MR. RADBIL: Early, yes.

19 THE COURT: But you didn't; you didn't
20 call him, either.

21 MR. RADBIL: There was nobody that I could
22 call. I couldn't call anybody.

23 THE COURT: Why?

24 MR. RADBIL: I was not in -- I was not
25 awake to call people. I was in bed sick.

1 THE COURT: Mr. Radbil, we're in the
2 middle of a jury trial. We have jury instructions
3 that were supposed to be ready to go by 10:15.
4 That's why everyone was supposed to be here at 8:00.

5 You have an obligation to your client,
6 which I have seen you fall short on since this trial
7 started, for all the reasons I talked about
8 yesterday. I am extremely troubled that you didn't
9 show up today; didn't call us until almost two hours
10 after you were due. So we have all been waiting
11 here with no jury instructions; the jury is here.

12 Your client, needless to say, has been
13 extremely concerned about where you were. Your
14 client has a right to counsel of choice. He also
15 has a right at any time to fire his counsel. And I
16 think that that ought to be a discussion at this
17 point. It was pretty clear to most of us that you
18 had abandoned this case. I've never had a lawyer do
19 that before.

20 MR. RADBIL: I disagree.

21 THE COURT: So I would like to make
22 sure -- Mr. Radbil, could I finish? I would like to
23 make sure that you've thoroughly addressed this with
24 Dr. White and I hear directly from Dr. White as to
25 how he wants to proceed.

1 Dr. White, if you will stand, please.

2 DR. WHITE: Your Honor, I think I've
3 already come to a decision with opposing counsel
4 about how to proceed. I don't think firing or
5 retaining has anything to do with the decision.

6 THE COURT: When you were gone, it was the
7 clear idea that you had abandoned the case
8 Mr. Radbil. I've never had anybody not show up like
9 this without a phone call. It's highly disturbing
10 behavior -- let me finish.

11 Your client indicated while we were
12 waiting for you that there were certain things that
13 came up yesterday that were new to him as far as
14 this damages issue and what had and hadn't been
15 disclosed. So you've got some issues between he and
16 you that may need to get resolved at some point.

17 In the meantime, I gave defense counsel
18 permission and described to Dr. White that he had an
19 absolute right to do what he wanted, to either talk
20 to them or not talk to them, but I was going to let
21 him make that decision on his own since we had not
22 heard a word from you. So apparently there was some
23 discussion with my blessing on where the case ought
24 to go. Have you talked to him about this?

25 MR. RADBIL: Briefly, as I was walking

1 into the courtroom. I talked to him about it very
2 briefly.

3 THE COURT: So Dr. White, is it your
4 desire to try to resolve this on some terms that you
5 were briefly able to discuss with defense counsel or
6 with or without counsel?

7 MR. RADBIL: I don't think --

8 THE COURT: I'm not asking you anything,
9 Mr. Radbil. I want to hear from Dr. White.

10 MR. RADBIL: He's my client.

11 THE COURT: I don't know that he's your
12 client anymore. I want you to be quiet for a moment
13 and let me hear from Dr. White.

14 DR. WHITE: Your Honor, I'm not sure of
15 the conditions of retaining counsel. I don't think
16 that's a question. It seems we've already come to
17 an agreement, and that's probably the best.

18 THE COURT: Okay. And would that be
19 between you and the defense without Mr. Radbil
20 involved? Or is he somehow -- I'm just trying to
21 figure out, is he part of the signing off on the
22 papers? And Mr. Radbil, just leave him alone. Take
23 a seat.

24 MR. RADBIL: I don't know --

25 THE COURT: Take a seat, Mr. Radbil. Take

1 a seat. Okay.

2 The question is this: You have a right to
3 proceed and settle this case with or without
4 counsel. You have a right to counsel of choice.
5 You don't have to put up with the kind of behavior
6 you have had with counsel in this case so far, but
7 you can. It's up to you.

8 When he didn't show up at all this morning
9 and we didn't hear from him, well beyond the period
10 of time he was supposed to, that's highly unusual
11 behavior. I've not had that in 30 years, an
12 attorney just not show up like that.

13 So the question is, what were you to do?
14 I told you we were going to have to go ahead without
15 hearing from him with the jury trial without him. I
16 have already made a ruling on the Texas Telephone
17 Act claim, which is now out of the case for the
18 reasons I stated. And so the issue is that these --
19 take a seat, Mr. Radbil. Mr. Radbil, take a seat.
20 I don't want to hear from you until I tell you I
21 want to hear from you.

22 The question is: Do you want to proceed
23 in your settlement discussions with Mr. Radbil, or
24 do you want to settle this case without him and
25 terminate him? Those are really your two options.

1 DR. WHITE: I do want to proceed with the
2 settlement agreement. I'm not sure that -- I'm not
3 sure that firing counsel changes that in any way.

4 THE COURT: The only way it would change
5 it is if he is your agent and refuses to sign off on
6 the settlement papers.

7 Mr. Radbil.

8 MR. RADBIL: I would like to counsel my
9 client, please, Your Honor.

10 THE COURT: Well, before you do that, I
11 want to find out what your intentions are. Do you
12 -- are you interested in engaging in settlement
13 discussions with defense counsel at this point or
14 not?

15 MR. RADBIL: We have engaged --

16 THE COURT: Are you interested at this
17 point or not?

18 MR. RADBIL: Yes, but I would like to
19 counsel my client.

20 THE COURT: Let me make something real
21 clear. I will let you counsel your client. I am
22 concerned about what you might say to him,
23 considering what I have heard about you so far and
24 watched about you so far, but just be clear on
25 something. For the two hours, three hours that you

1 were supposed to be here today that you weren't
2 here, the attorney's fees incurred by the defense on
3 this side will be paid by you out of pocket for
4 those three hours we have been sitting around
5 waiting for you. I will get a bill from them, find
6 out what they are, and you are going to pay them.
7 So just make sure you are clear that that's part of
8 this ultimate resolution of this case.

9 MR. RADBIL: Before --

10 THE COURT: Ms. --

11 MS. MALONE: Your Honor, I would like to,
12 if I could, put on the record the agreement that we
13 had made with Mr. White so that Mr. Radbil can hear
14 it and so the Court can hear it.

15 I have told Mr. White that the agreement
16 from our standpoint still stands, but I think it
17 would help the Court understand what our agreement
18 exactly was.

19 We have agreed that we would pay Mr. White
20 the \$1,000 that we had offered him at the beginning
21 of the case, and we would waive any right to pursue
22 attorney's fees --

23 THE COURT: It's impossible for Mr. White
24 to hear this if you are talking to him, Mr. Radbil.

25 MR. RADBIL: I would like to counsel my

1 client.

2 THE COURT: Take a seat. If you don't
3 take a seat, you will be held in contempt. You have
4 done enough already in this case. Take a seat. I
5 will let you counsel with your client, if he is your
6 client, at the appropriate time.

7 Go ahead.

8 MS. MALONE: Your Honor, we said we would
9 pay the \$1,000 directly to Mr. White made payable to
10 Mr. White and waive any right to pursue attorney's
11 fees that we would be entitled to under a Rule 68
12 offer of judgment if it were to proceed.

13 We also agreed with Mr. White that we
14 would specifically retain the right to proceed for
15 attorney's fees against the law firm of
16 Weisberg & Meyers and Noah Radbil under 1927 motions
17 for attorney's improper filings of pleadings and
18 procedures and also the Rule 37 sanctions we
19 discussed as part of our motion yesterday. And we
20 had indicated to Dr. White we would have no further
21 actions towards him, we only wanted to retain our
22 right to go for attorney's fees against the law
23 firm, and we would file it in this case.

24 THE COURT: Okay. All right. I want,
25 Mr. Radbil, you and your client to step outside and

1 talk. And then I want to hear from him how he wants
2 to go ahead, with you or without you. And once we
3 figure that out, we will decide. I know I've heard
4 from you. He wants a chance to talk to you. Until
5 it's clear that he's fired from the case or not, I'm
6 going to give him that opportunity to talk to you,
7 Dr. White, unless you are telling me right now you
8 don't want to do that.

9 DR. WHITE: No, I am not.

10 THE COURT: Let's take ten minutes.

11 (Recess taken from 10:23 to 10:39.)

12 MR. RADBIL: Your Honor, may I request a
13 conference in chambers briefly?

14 THE COURT: With the other counsel?

15 MR. RADBIL: Yes.

16 THE COURT: It would be on the record.

17 MR. RADBIL: Okay. That's fine.

18 THE COURT: Does this have something to do
19 with attempting to resolve this case?

20 MR. RADBIL: It does have something to do
21 with attempts to resolve the case.

22 THE COURT: We have a jury that's already
23 been waiting 20 minutes past what we have told them.
24 Is this like moving towards settlement?

25 MR. RADBIL: Well, I'm concerned because I

1 understand my client may have been threatened this
2 morning.

3 THE COURT: Oh, please. First of all,
4 Mr. Radbil, I don't believe the excuse that you have
5 given us for showing up this morning. You look
6 fine, you never called us. So I think it's yet
7 another one of your prevarications in this case that
8 is completely in the disinterests of everything the
9 Court is supposed to move ahead and everything
10 that -- the Court's obligations to ensure that both
11 sides are proceeding ethically and professionally,
12 particularly the Court's inherent responsibility
13 over watching over counsel.

14 So once again, in, I don't know how many
15 incidents, I have found you untruthful and
16 incompetent. And now, as I have suspected, instead
17 of going forward with what appears to be in the best
18 interests of your client, you are pointing your
19 finger again, which so far has rendered you, again,
20 to appear as someone who doesn't know how to tell
21 the truth.

22 So if that's all this is about, then, no.
23 The truth is, is that you have let your client down,
24 you have let the Court down, you have inconvenienced
25 the jury, and you have inconvenienced and cost money

1 and expense to defense counsel.

2 So it sounds like what you have done is
3 turned the whole thing around for your poor client
4 and make it sound like he's been the victim of
5 someone besides you.

6 What is your agreement between you and
7 Dr. White with regard to attorney's fees?

8 MR. RADBIL: Our agreement with regards to
9 attorney's fees is that he is not going to be
10 responsible for paying our attorney's fees --

11 THE COURT: Anyone's.

12 MR. RADBIL: -- under the statute. And
13 under the FDCPA, the Court is the decider of
14 reasonable and necessary attorney's fees.

15 THE COURT: Here's my question: Does he
16 owe you, by contract or otherwise, any potential
17 responsibility for attorney's fees?

18 MR. RADBIL: Not anymore.

19 THE COURT: Okay. What do you mean, not
20 anymore? Because isn't there a signed agreement
21 between the two of you that would indicate that he
22 does?

23 MR. RADBIL: I think that it indicates
24 that if he would accept a settlement, which would
25 provide for less than the amount of recovery -- and

1 I have to go back and read it carefully before --

2 THE COURT: Well, what about this,
3 paragraph 11 of your agreement? There are only
4 three ways that client can be required to pay
5 attorney's fees to Weisberg & Meyers or anything
6 more than the amounts stated above, one: If the
7 client terminates attorneys services or otherwise
8 fails to cooperate in the prosecution of his case.

9 So right now, if Dr. White were to fire
10 you for your incompetent, under your contract he
11 would owe you money; is that right?

12 MR. RADBIL: I disagree with the
13 statement, number one; number two, we won on summary
14 judgment; and number three, we would never do that
15 to Dr. White.

16 THE COURT: But you signed an agreement
17 that says you will.

18 MR. RADBIL: And I will amend the
19 agreement.

20 THE COURT: You will vitiate the
21 agreement? Are you saying right now it's no good?

22 MR. RADBIL: No.

23 THE COURT: You're not going to hold him
24 liable for this agreement?

25 MR. RADBIL: I'm not saying --

1 THE COURT: Let me read the next sentence.
2 Again, if he terminates your services, it looks like
3 under this contract, he owes you money. If the
4 client enters an agreement whatsoever with the
5 defendant that does not require the defendant to pay
6 in full attorney's fees and costs incurred by
7 Weisberg & Meyers without prior written consent of
8 Weisberg & Meyers to enter into such agreement.

9 So basically, if he agrees with them and
10 fires you, he has a whole lot of liability towards
11 Weisberg & Meyers, correct?

12 MR. RADBIL: He's concerned that he was
13 threatened with that this morning. And I was
14 talking to him and explaining that not only will
15 that not happen, but I am happy to memorialize that.
16 That's something I will talk about with my client.

17 THE COURT: Let's go ahead and get it in
18 writing here in court.

19 Mr. Radbil, you haven't -- you've
20 indicated and presented yourself as someone who is
21 not to be believed at every turn. You have let your
22 client down. You weren't prepared for trial. You
23 didn't even submit marked exhibits. You took on
24 theories that made no sense. You made statements,
25 at least four that I can think of off the top of my

1 head, that were completely untrue. Your strategy
2 and your questions weren't even close to what I
3 thought they would be compared to the summary
4 judgment pleadings.

5 So you have handled yourself in a way that
6 I see as detrimental to your client in this case.
7 And then, on top of all that, you are supposed to be
8 in here on the big day, jury argument with the jury
9 instructions and the Court's ruling on the Rule 50
10 motion, and you are a no-show. You don't show up at
11 7:00, you don't show up at 6:30. You don't even
12 call. We finally hear from you at 9:45. That's
13 incompetence. That's worse than incompetence.

14 So I just want to make sure that this
15 idea, with this incompetence, that he actually wants
16 to keep you in this case and is not keeping you
17 because he is afraid you will somehow hold this
18 contract against him. So you are not going to?

19 MR. RADBIL: No. I mean, we have a
20 contract of representation. He does not want to
21 fire me, because I have represented him well in this
22 case. We won on summary judgment.

23 THE COURT: Dr. White, let me have you
24 speak for yourself.

25 Please take a seat, Mr. Radbil. Please

1 take a seat.

2 Dr. White, you have a right to counsel of
3 your choice, of course. I have never seen this kind
4 of behavior in federal court from a defense attorney
5 or a plaintiff's attorney. It's not just
6 inexperience, it's incompetence, and it's not being
7 truthful; operating in bad faith. To leave you here
8 this morning for two hours is unconscionable.

9 Having said all of that, I think you can
10 glean from what I have said, you have a choice to go
11 forward with him or not. If there is a concern that
12 you have to being bound by some agreement, then we
13 need to talk about it, because I would be really
14 worried about the ethics behind your decision.

15 So what do you want to do?

16 DR. WHITE: Your Honor, I apologize. I'm
17 a little overwhelmed by the --

18 THE COURT: I understand.

19 DR. WHITE: -- legalities. And Mr. Radbil
20 has assured me that that will be a matter of record,
21 that I'm not responsible for any attorney's fees.

22 It's equally threatening to consider
23 firing my counsel. I'm not sure which, honestly,
24 would be the better choice at this point. I'm
25 interested in settling the case as quickly as

1 possible, whether that be by jury or otherwise.

2 THE COURT: And it doesn't sound, though,
3 now that Mr. Radbil is with you and you have decided
4 to retain him, that settlement is a possibility; is
5 that correct?

6 DR. WHITE: I'm sorry?

7 THE COURT: It sounded like settlement was
8 off the table with him representing you, or am I
9 wrong about that?

10 DR. WHITE: That's wrong.

11 THE COURT: Okay. So you still can agree
12 to settle this case and resolve it before the jury
13 makes a decision.

14 DR. WHITE: If we can come to an
15 agreement, yes. I feel -- I don't feel safe firing
16 counsel at this point.

17 THE COURT: That is your choice. All I'm
18 trying to point out is that you haven't been
19 well-served from your perspective. It is your
20 choice.

21 Now, with that in mind, I would like to
22 give you a chance with Mr. Radbil to talk to
23 opposing counsel for a short time. I'm going to let
24 the jury go for the day, and we will start this jury
25 trial up tomorrow. I won't have them waiting here

1 any longer. But I want to hear back from you in 30
2 minutes as to whether or not there has been a
3 settlement, understanding that, Dr. White, you would
4 like to keep your attorney.

5 See you back in 30 minutes and see where
6 we are.

7 (Recess taken from 10:48 to 11:13.)

8 THE COURT: Okay. I guess really the only
9 question is if the parties have settled.

10 Mr. Radbil?

11 MR. RADBIL: We have not, Your Honor.

12 THE COURT: Okay. Ms. Malone?

13 MS. MALONE: We have not, Your Honor.

14 There is one matter we need to clear up.

15 THE COURT: Okay.

16 MS. MALONE: Mr. Radbil seems to think I
17 had inappropriate conversations with his client this
18 morning after the Court gave me specific permission
19 to do so, and I am frankly furious about it.

20 THE COURT: Well, it's -- Mr. Radbil, your
21 behavior has been shocking. And I have found it
22 driven as we go through this by bad faith and
23 dishonest behavior.

24 You didn't show up for trial this morning
25 after your poor, substandard behavior yesterday; no

1 word from you. As I said, I have no glimmer of
2 belief that you were sick, but you just didn't show
3 up to create a little chaos here in the courtroom,
4 and you did. And you have shown up and you look
5 fine, and no one heard from you for two hours,
6 including your client.

7 So don't you dare accuse defense counsel
8 of anything, when you brought on all of the chaos
9 this morning that caused the Court to ask, in my
10 obligation, to make sure things are being ethically
11 conducted, to ask your client if he heard from you,
12 and, if not, what his position was on this case.

13 As far as I knew, you abandoned the case.
14 And no good attorney, not even close to competent
15 attorney, would have done what you did. So if you
16 haven't settled, we will do the jury argument at
17 3:00 today, so I need some jury instructions. I
18 will not let the jury go.

19 We will take care, Mr. Radbil, of your
20 conduct after this case is over, and it will be
21 serious.

22 I've got proposed jury instructions, and
23 I'm going to put something together and get it out
24 here to you. I want both sides here until we get
25 that out, and I want an agreement to the charge. If

1 there is nothing else on the jury charge, we will
2 recess, but I want you here. The jury argument, I
3 hope, will be conducted between 2:30 and 3:00.

4 MS. MALONE: So we're supposed to wait
5 until the charge comes out, Your Honor?

6 THE COURT: Yes. Are you all right?

7 MS. MALONE: Yes. I'm just mad.

8 THE COURT: All right. We will be in
9 recess.

10 (Recess taken from 11:15 to 2:20.)

11 (Out of the presence of the jury.)

12 THE COURT: You should have a copy with
13 many of the typos and whatnot from the first version
14 corrected. I've got -- okay. So let me hear from
15 both of you. We are still going to start up at
16 3:00. The jury will be back at three, Mr. Radbil.
17 Just tell me what page you are on.

18 MR. RADBIL: Your Honor, I'm on page 5 of
19 14.

20 THE COURT: Okay. Are you on the one I
21 sent you back, because there are some major changes.

22 MR. RADBIL: No, Your Honor, I'm not.

23 THE COURT: Go to that one, please.

24 MR. RADBIL: I think it was stipulated
25 also that the consumer -- that the debt was a

1 consumer debt under the FDCPA and that stipulation
2 is not included. I would object to the
3 non-including of that.

4 THE COURT: I have Joint Statement of
5 Stipulated Facts, and I have four stipulated facts.

6 MR. RADBIL: We did that when I raised
7 this issue before trial began, I believe.

8 THE COURT: Okay. So what you're asking
9 is that something else be in there as a stipulated
10 fact, and that is what?

11 MR. RADBIL: That the debt that RAB
12 attempted to collect from Dr. White was, in fact, a
13 consumer debt.

14 THE COURT: Ms. Malone?

15 MS. MALONE: Judge --

16 THE COURT: I don't see a need to add it.
17 The stipulated facts are an optional addition by the
18 Court in the charge, and they're in there. I
19 understand your position. Let's move on to your
20 next position. It's a quarter of three. We were
21 supposed to start today at ten.

22 MR. RADBIL: I wanted to preserve my
23 objections.

24 THE COURT: I am not letting you not
25 preserve your objections, I just want to be clear on

1 the time frame here.

2 MR. RADBIL: On Section 2, liability.

3 THE COURT: What page?

4 MR. RADBIL: Page 6 of 20.

5 THE COURT: Okay.

6 MR. RADBIL: I believe -- and I will
7 double-check. I thought that the Court found as a
8 matter of law in its summary judgment ruling that
9 Simple Surrogacy was the place of employment.

10 THE COURT: Ms. Malone?

11 MS. MALONE: I thought you found it as a
12 fact issue.

13 THE COURT: I disagree; overrule that
14 objection. Let's move on to your next one. Okay?

15 MR. RADBIL: Okay.

16 THE COURT: While he's doing that,
17 Ms. Malone, I'm assume you are not contesting that
18 stipulated fact that he was asking about, that it's
19 a consumer debt?

20 MS. MALONE: No, ma'am. I just don't
21 think it's an issue.

22 THE COURT: It's not. Okay.

23 Where are you, Mr. Radbil? What page?

24 MR. RADBIL: I'm on page 6 of 20.

25 THE COURT: Let's move along here.

1 MR. RADBIL: I would like to include, if
2 possible -- or I object to the exclusion of an
3 instruction or explanation of 1692c(a)(3) based on
4 Horkey, so what is necessary for the debt collector
5 to have reason to know.

6 THE COURT: Okay. Is there a pattern
7 5th Circuit on that?

8 MR. RADBIL: No.

9 THE COURT: Is there a case you are aware
10 of that that has been approved or mandated as part
11 of the jury instruction?

12 MR. RADBIL: I haven't looked at the
13 instruction on it.

14 THE COURT: But you aren't aware of any?

15 MR. RADBIL: No.

16 THE COURT: Let's move on to your next
17 objection. Overruled.

18 What page are you on, Mr. Radbil?

19 MR. RADBIL: I'm on page 7 of 20.

20 THE COURT: You've got to move along.
21 It's ten to three. I want your objections. Come
22 on.

23 MR. RADBIL: I will pick it up. So
24 question 1 says --

25 THE COURT: What page?

1 MR. RADBIL: Page 7 of 20.

2 THE COURT: Okay.

3 MR. RADBIL: Actually, I don't object.

4 That's okay.

5 THE COURT: Okay. Let's move to page 8.

6 MR. RADBIL: Okay. So the biggest problem

7 I have actually does relate to page 7, which is --

8 THE COURT: Page 7 or page 8?

9 MR. RADBIL: Page 7.

10 THE COURT: Are you on the new copy?

11 MR. RADBIL: Yes.

12 THE COURT: Okay. What's the problem?

13 MR. RADBIL: It appears to me that if they
14 answer no to Question 1, that the jury would skip
15 the entire instruction on damages by skipping, and
16 there's no -- at least I haven't gotten that far
17 yet.

18 THE COURT: I don't agree with you on
19 that, so your objection is so noted.

20 Let's move on to your next objection,
21 please.

22 MR. RADBIL: Can I get a ruling on the
23 objection?

24 THE COURT: Overrule the objection.

25 MR. RADBIL: So also placing the

1 instruction on page 7 of 20 to refer over and past
2 the damages part seems to inform the jury of their
3 legal effect.

4 THE COURT: Mr. Radbil, the transition
5 sentence down there indicates to them, which would
6 otherwise be greatly confusing to them, if they
7 answer yes, then they go to damages essentially. It
8 doesn't say that, but they go to Question Number 2,
9 which, if you don't want them to consider damages if
10 they answer yes, that's fine, but I'm assuming you
11 do. Otherwise, if they answer no, if they don't
12 answer yes, which is pretty straightforward, they
13 are supposed to go to Question Number 4, which takes
14 them to the damages on the predetermined claims.

15 So overrule that objection. Give me
16 another one.

17 What page are you on?

18 MR. RADBIL: I'm on 12 of 20.

19 THE COURT: So we have passed 8, 9, and
20 10, and you are on page -- past 11 and on page 12;
21 is that right?

22 MR. RADBIL: That's correct.

23 THE COURT: Okay. What's the objection?

24 Mr. Radbil?

25 MR. RADBIL: I don't have any objections

1 to that page.

2 THE COURT: Next page, next objection.

3 MR. RADBIL: I object to the exclusion of
4 the elements of the cause of action, 15 U.S.C.
5 1692d(6).

6 THE COURT: On what page?

7 MR. RADBIL: Page 14 of 20.

8 THE COURT: Okay. And you want the
9 elements of the cause of action?

10 MR. RADBIL: Of the text of d(6).

11 THE COURT: Overruled. Go ahead. Next
12 objection.

13 MR. RADBIL: Same objection on page 15 of
14 20, Question 5. We would request the inclusion of
15 the text of 1692e(11).

16 THE COURT: Overruled.

17 I'm going to assume that those statutory
18 texts were included in your proposed charges filed
19 late last night?

20 MR. RADBIL: They were.

21 THE COURT: Okay. Move ahead. Go ahead.

22 MR. RADBIL: Same objection on page 16 of
23 20 to Question 6.

24 THE COURT: Overruled. Again, I haven't
25 been provided a pattern or any authority that

1 indicates that's a required portion of the jury
2 instructions. With that, overrule those objections.

3 You have the same to Question 7?

4 MR. RADBIL: Yes, Your Honor.

5 THE COURT: That's on page 17. That's
6 overruled. And the final instructions.

7 MR. RADBIL: I object to the part that the
8 Court has no opinion as to the merits of the --

9 THE COURT: I changed that based upon your
10 interlining of that previous sentence. I believe
11 the previous sentence is straight out of a pattern.
12 So now you are objecting to the change? Because
13 your previous objection was different, so I changed
14 it.

15 MR. RADBIL: I object -- I don't think I
16 object to the change --

17 THE COURT: You interlined the other one,
18 so pick up your interlined portion and look at
19 that --

20 MR. RADBIL: I know --

21 THE COURT: -- and see if you didn't
22 interline that very part of the sentence.

23 MR. RADBIL: I did. I know what it says.

24 THE COURT: That was because you were
25 objecting to it?

1 MR. RADBIL: To that word, but I also
2 object to the word, opinion as to the merits.

3 THE COURT: Okay. Overruled. Anything
4 else? It's five till three. You were supposed to
5 be here this morning at 8:00, got here close to ten.
6 It's five to three. The jury has had to wait.

7 Do you have any other objections?

8 MR. RADBIL: No.

9 THE COURT: I want the record to be clear
10 on this. You don't?

11 MR. RADBIL: No more objections.

12 THE COURT: Ms. Malone?

13 MS. MALONE: First of all, beginning on
14 page 8, which is the damages section, I would
15 generally object to the failure to include the
16 requested instructions for both preexisting
17 conditions and mitigation of damages, which were
18 submitted in our doc number 78, which was our
19 proposed charge.

20 THE COURT: Okay. I overrule that
21 objection unless you can show me a pattern or a case
22 that indicates that's a required part of these jury
23 instructions.

24 MS. MALONE: Your Honor, we cited it from
25 the -- we used a pattern jury charge from the Texas

1 Supreme Court, as there isn't one -- and I believe
2 one of them had a 5th Circuit one for preexisting.
3 But let me look on the page, and I will tell you
4 exactly. On the bottom of our page, Your Honor, of
5 the submitted proposed charge, we did include the
6 authorities.

7 THE COURT: Ms. Malone, I understand where
8 you're coming from. You can certainly argue that,
9 you have raised that by the cross-examination. But
10 at this point, I overrule the objection as that
11 being a mandatory part of the jury instructions. Go
12 ahead.

13 MS. MALONE: I understood this to be
14 preservation of our error. Some of them I know you
15 will overrule, I just want to protect my record.

16 THE COURT: I understand. It's just been
17 a long day. That's all.

18 MS. MALONE: I understand. It has been
19 for me, too.

20 We also would object to the failure to
21 include, under the actual damage section, the
22 Parkway Standard, which is on doc 78 of our proposed
23 charge, page 13. In that case we cited Gonzalez,
24 Parkway, and Guajardo, Your Honor, which is a
25 5th Circuit Court of Appeals that said that they

1 should have used the Parkway Standard, particularly
2 in light of the fact that they were submitting Texas
3 Debt Collection Act stuff. And also an Austin Court
4 of Appeals case Elston v. RMS.

5 THE COURT: Just so that I am clear, I
6 know you have raised this in your papers and you are
7 and preserving your objection now, but could you
8 give me a little specifics about what the language
9 is that you're asking? Not all of it.

10 MS. MALONE: Sure. The definition that we
11 have provided to you is straight out of the Parkway
12 case, which is a Texas Supreme Court case. And it
13 defines mental anguish to be more than mere
14 humiliation, anger, et cetera. It must rise to the
15 level of causing a daily disruption in a person's
16 life, and it gives a very specific definition.

17 That definition was one that the attorney
18 failed to argue in the lower court in Guajardo, and
19 the 5th Circuit said you should have raised it
20 there.

21 THE COURT: Was it debt collection
22 practices case?

23 MS. MALONE: Yes, ma'am. And both Elston
24 and Gonzalez are Texas Court of Appeals cases that
25 talked about the need to do a proximate cause. One

1 of the problems I have is there is no proximate
2 cause definition, and there is also no proximate
3 cause requirement for the Texas statutes, which are
4 required by Texas controlling state law. And so
5 that's my problem with the damage questions, to be
6 honest.

7 Your question merely asks, are due to,
8 which is different than proximate cause. As the
9 Court knows, proximate cause is a higher standard
10 for the plaintiff to meet, and certainly the
11 defendant needs that level to be there, that there
12 is a proximate causal relationship between the
13 events and claimed damages.

14 THE COURT: Mr. Radbil, do you agree with
15 that?

16 MR. RADBIL: Our firm handled Guajardo, so
17 I think she may be correct insofar as the standard
18 for disruption of the daily routine. I don't agree
19 with proximate cause. I haven't read Guajardo in a
20 while.

21 THE COURT: Do you have a proposal that
22 you can hand up to me?

23 MS. MALONE: I do. It's on doc 78, page
24 13. If you will give me. I'm sorry, Judge, I
25 flipped it.

1 THE COURT: That's all right.

2 MS. MALONE: Actually, I have a pink flag
3 on that.

4 THE COURT: If you will hand that to
5 Ms. Woodward, please. Tell me exactly where you are
6 asking it to be inserted.

7 MS. MALONE: I think it needs to be
8 inserted in the definition of actual damages. I
9 would actually put it at the beginning of
10 paragraph -- on page 9 with the first paragraph,
11 maybe there, or if you wanted to put it in the
12 preceding paragraph.

13 THE COURT: You're asking for it at the
14 bottom of page 9, first paragraph -- bottom of the
15 first paragraph on page 9?

16 MS. MALONE: I should have thought about
17 that better, Judge. Actually I think it should be
18 page 8 of 20, when you are talking about the
19 compensatory damages, at the end of that paragraph.

20 THE COURT: Okay. I understand what you
21 are asking. Now, what do you have on proximate
22 cause that you are wanting to submit?

23 MS. MALONE: Well, we submitted a
24 definition of proximate cause from the pattern jury
25 charge. And I did not flag that, Your Honor. I

1 have a pattern jury charge, though.

2 THE COURT: This is a 5th Circuit --

3 MS. MALONE: I think proximate cause for
4 the Texas one is actually out of the Texas Supreme
5 Court one.

6 MR. RADBIL: Your Honor, while she's
7 looking that up --

8 THE COURT: Let's give them their turn,
9 and then I will let you answer, unless you agree to
10 it.

11 MR. RADBIL: Well --

12 THE COURT: Do you agree to it? If you
13 don't, I will let you speak when she is finished.

14 MR. RADBIL: No. This has to do with the
15 location of the --

16 THE COURT: Guajardo language?

17 MR. RADBIL: Yes. That only applies to
18 the Texas Debt Collection Act, so it should not go
19 in the general actual damages.

20 THE COURT: All right.

21 MS. MALONE: Your Honor, the definition of
22 proximate cause as provided by the Texas Supreme
23 Court is here.

24 THE COURT: And tell me where you think
25 this should go.

1 MS. MALONE: I think it should go
2 following that paragraph that we were just looking
3 at. Or the other option, Your Honor, if he wants to
4 tie -- this could be actually a real solution. We
5 could include it as a definition on the page with
6 the questions for the Texas cases only.

7 THE COURT: I know your position on the
8 first question, Mr. Radbil. What about the
9 proximate cause definition with regard to the Texas
10 statute?

11 MR. RADBIL: I don't think that proximate
12 cause is an element of damages under the TDCA. I
13 think that there just has to be -- I think in
14 Guajardo it talks about that -- I don't recall
15 exactly what, but just has to be shown that it was
16 reasonably foreseeable, that the damages could have
17 resulted, and I think that's the Guajardo language
18 in the footnote, rather than proximate cause, which
19 is a much different standard, then we would have to
20 explain proximate cause.

21 MS. MALONE: Your Honor, Elston v. RMS,
22 950 S.W.2d 950, I think I -- I will get you a better
23 page for that. It's in our trial brief, and I'm
24 sorry, I will get it for you. It specifically says
25 proximate cause is a requirement under the Texas

1 Statute, and that is the Austin Court of Appeals
2 case. And it's also adopted in the Gonzalez case,
3 which is San Antonio Court of Appeals case. There
4 is no Texas Supreme Court case on it at this time.

5 THE COURT: Okay. I think what we have to
6 clarify for purposes of argument is this idea of
7 causation. I know the position is here that this is
8 a strict liability statute, but there's got to be
9 some measure of proof that supports the amount of
10 damages. And so I don't want to have you both up
11 there arguing something confusing on how they are
12 supposed to determine damages. Am I to hear you
13 say, Mr. Radbil, that there -- if there's no
14 proximate cause, how are they to determine the
15 measure of damages to award?

16 MR. RADBIL: The Guajardo case out of the
17 5th Circuit actually addresses that specifically in
18 a footnote. I wrote it down. It's to be based on
19 just the testimony of the witness and --

20 THE COURT: What support? There's got to
21 be factual support for a jury's determination on
22 anything?

23 MR. RADBIL: There is no established
24 causation.

25 THE COURT: Where do they come up with a

1 figure?

2 MR. RADBIL: His testimony.

3 THE COURT: All right. Go ahead.

4 MS. MALONE: Your Honor, actually,
5 there's -- there is a requirement of proximate
6 cause. In the statute, itself, it actually says,
7 actual damages sustained as a result of a violation
8 of this chapter, which is Texas Findings Code
9 392.403(a)(2), and I have the rest Ellison cite.
10 It's Elston v. Resolution Services, 950 S.W.2d 180.
11 And just to give you a heads-up, Judge, at the time
12 Elston was written, the Finance Code had not been
13 codified yet, so it does give a different number,
14 but it defines it as the Texas Debt Collection Act.
15 So when you first look at it -- and it has been
16 adopted, again, by the Gonzalez case.

17 And in the Elston case, what happened was
18 they found a technical violation of the statute.
19 And the Court said, because you failed to show how
20 that technical violation resulted in damage to this
21 person, proximate cause, you lose. So that's pretty
22 heads-up.

23 THE COURT: I certainly understand your
24 position on this. And at the very least, I think it
25 would be appropriately something, depending on what

1 this jury does, to examine postjudgment. At this
2 point I'm not comfortable enough from what I have
3 heard to add this to the jury instructions.

4 I share the confusion about where they are
5 supposed to come up with damages and the amount.
6 But be that as it may, I think it's a safer route to
7 deny those -- overrule those objections with regard
8 to your request to include the Guajardo,
9 G-U-A-J-A-R-D-O, case, as well as the Texas Pattern
10 on Proximate Cause. Let me pass these back down to
11 you.

12 What else, Ms. Malone?

13 MS. MALONE: Also I have to object to the
14 inclusion of any actual damages based on my Rule 37
15 Motion yesterday, and I would like to continue my
16 objection on that issue.

17 THE COURT: Yes, and that's overruled
18 without prejudice at this time.

19 MS. MALONE: Your Honor, additionally, I
20 have a problem with the statutory question. You
21 have it in two places now, which is in 4 and 5. It
22 has been removed from 6. But the way that this is
23 written now, they could have two separate findings
24 of \$1,000 in an amount of 2,000.

25 THE COURT: Right. And here's what my

1 thought is on that, and we thought about that. It
2 brings to mind some of these employment statutes in
3 federal court where there is a 300,000 cap, and we
4 don't tell the jury that. We just let them make the
5 award, and then we cap it as the statute requires
6 posttrial. And so it seems to me that the
7 statute -- there's no reason to put a specific
8 instruction about that, and that's the reason I
9 didn't. If you can give me some reason why that's
10 erroneous, I will be glad to reconsider it.

11 MS. MALONE: My last objection, Your
12 Honor, is specifically a failure to include a
13 bona fide error defense related to the issue on the
14 employment question, contacting the employer's
15 office.

16 THE COURT: Overruled. Anything else,
17 Ms. Malone?

18 MS. MALONE: That's it, Judge.

19 THE COURT: I will give you 15 minutes
20 each. How much do you want on opening and rebuttal?

21 MR. RADBIL: Ten and five.

22 THE COURT: Okay. And Ms. Malone?

23 MS. MALONE: I'm sorry?

24 THE COURT: What kind of warning do you
25 want?

1 MS. MALONE: Five. Judge, I do think
2 there is one recordkeeping thing we have to do.

3 THE COURT: Go ahead.

4 MS. MALONE: I never formally rested
5 yesterday.

6 THE COURT: Yes, you are right.

7 MS. MALONE: So I guess defendant rests.

8 THE COURT: Both sides rest and close; is
9 that correct?

10 MR. RADBIL: Correct.

11 MS. MALONE: Yes.

12 THE COURT: Okay. Thank you.

13 Do we have the exhibits? Because what I
14 want to make sure of is that each of you have
15 touched and viewed -- and I still don't know if I
16 have your marked exhibits, Mr. Radbil, for the
17 Court. But at this point I want to make sure there
18 are marked exhibits that both sides have looked at
19 that are admitted or preadmitted before they go back
20 to the jury. You don't have to do that this minute,
21 but we will do that after argument.

22 So is there anything else? Any questions
23 about argument or anything of that nature? Okay.

24 Let's fix the lecturn so it's turned
25 around. We will go ahead, and I will get

1 Mr. Reynolds to come in here and make our jury
2 instructions. I will read the instructions after
3 the arguments. If you will make sure, Mr. Everett,
4 that the jurors are here.

5 MR. RADBIL: Your Honor, will you give a
6 warning did you say?

7 THE COURT: What did you want again?

8 MR. RADBIL: I said ten and five, but
9 maybe I won't need the whole ten.

10 THE COURT: So you want me to give you a
11 warning after you have used eight minutes?

12 MR. RADBIL: Yes, please.

13 THE COURT: And a warning when you have
14 used, say, three at the end?

15 MR. RADBIL: Please.

16 THE COURT: The jury is ready. Both sides
17 ready?

18 MR. RADBIL: Yes, Your Honor.

19 THE COURT: Let's bring them in. All
20 rise, please.

21 (Jury enters courtroom at 3:10 p.m.)

22 THE COURT: I first apologize, and I hope
23 you know it's from my heart and the attorneys. We
24 have been working since 8:00 this morning and
25 nonstop on some issues that -- some of which were

1 not anticipated. That's what's taken so long. So
2 just be glad it's a nice day out there, and I hope
3 you got to enjoy it a little bit.

4 Before we go any further, I think the
5 record should reflect the position of the case on
6 both sides.

7 Mr. Radbil, the plaintiff rests?

8 MR. RADBIL: Yes.

9 THE COURT: And the defense?

10 MS. MALONE: Rest, Your Honor.

11 THE COURT: Both sides rest and close?

12 Gentlemen, ladies, both sides rest and
13 close?

14 MR. RADBIL: Yes.

15 MS. MALONE: I'm sorry, yes, ma'am.

16 THE COURT: Ladies and gentlemen, where we
17 are now is the closing arguments. I had toyed with
18 the idea of just bringing you back tomorrow and
19 starting over with this, but it really did not seem
20 fair to not get this case submitted to you this
21 afternoon. So the lawyers have 15 minutes each to
22 argue, and then I will read the instructions, and
23 then the case is yours to take back and make a
24 decision on.

25 Without further ado, Mr. Radbil, with the

1 burden of proof, let me call on you first.

2 Mr. Radbil?

3 MR. RADBIL: Thank you, Your Honor.

4 MR. RADBIL: Ladies and gentlemen, thank
5 you again for the time and the patience throughout
6 yesterday and this morning and today especially.
7 Your service is appreciated by Dr. White and myself.

8 Dr. White invested 12 years of his life
9 after high school studying to practice psychology.
10 One of the major issues in this case is the student
11 loans that unfortunately Dr. White defaulted on.

12 There is no dispute that there was a
13 default. It's not something that he's proud of.
14 He's making arrangements to pay back his loans, and
15 he intends to fully pay back every penny of those
16 loans.

17 But Regional Adjustment Bureau is a debt
18 collector, and it's a fine business, but if you
19 operate such a business, you must do it in a lawful
20 manner. In this case, the evidence shows that the
21 debt collection business was conducted in an
22 unlawful manner and that they placed calls, Regional
23 Adjustment Bureau, to Dr. White's place of
24 employment, Simple Surrogacy, after they were placed
25 on clear notice that he couldn't receive such calls.

1 That caused a tremendous problem for
2 Dr. White, not only that it violated the Federal
3 Fair Debt Collection Practices Act, but because he
4 wasn't permitted to use his telephone numbers at
5 Simple Surrogacy for personal use. And so every day
6 he lived in fear that Stephanie, this supervisor
7 that he had --

8 MS. MALONE: Objection, Your Honor. I'm
9 going to object as going outside the record.

10 THE COURT: Overruled.

11 MR. RADBIL: He was concerned, waking up,
12 going to sleep, that he was going -- that that day
13 was going to be the day that he was going to get the
14 call saying, I'm fired from my job at Simple
15 Surrogacy, and that was his only source of income.

16 Without his source of income, he can't
17 make any payments on any of these student loans.
18 Which, by the way, he was paying \$300 a month, I
19 believe, for one year and then \$409 a month for a
20 second year, all the while trying to work with
21 Regional Adjustment Bureau on a payment arrangement
22 they wouldn't provide to him.

23 So with no income, he can't pay back -- he
24 wouldn't be able to continue to pay back his loans.
25 If he couldn't continue to pay back his loans, he

1 couldn't be licensed and couldn't practice
2 psychology. So every day he was concerned about the
3 real possibility that he would lose what he had
4 worked for for most of his life. He's a hard
5 worker. You have heard his story.

6 In regard to the actual damages he's
7 suffered, that's for you to decide based on his
8 testimony. I have tried to present him in as direct
9 and fair light as I could. And I think the evidence
10 shows that there are legitimate actual damages in
11 this case. But again, it's something for you
12 decide.

13 If you should decide he doesn't deserve
14 any, that's your choice. And if you decide that he
15 does, he would certainly be obliged. So I will turn
16 it over.

17 Thank you.

18 THE COURT: All right. Thank you,
19 Mr. Radbil.

20 THE COURT: Ms. Malone.

21 MS. MALONE: Good afternoon, ladies and
22 gentlemen. My grandfather was a great, great man.
23 He was born in the late 1890s. And as you can
24 imagine, being born at that time, he saw huge
25 changes in the world with the industrialization.

1 And in 1941, he was too old to actually be
2 a member of the service when Pearl Harbor happened,
3 but my grandfather was a civil engineer. He built
4 bridges. You may remember those one-lane bridges
5 you used to drive across in Texas that have the big
6 beams on them. My grandad built a lot of those.

7 And he used to tell me a lot of stories
8 about things that he thought were important to me.
9 One of the things he told me, because he knew I was
10 headed for law school and had big dreams, and I was
11 a teenager, he said that it was very important that
12 I never judge a person by what kind of sheepskin
13 they hang on the wall.

14 He told me that some of the bravest men
15 that he ever met and some of the smartest men he met
16 were in Pearl Harbor. They were field construction
17 guys who were pulled in, who were older guys, to try
18 to say what they could at the harbor, and they often
19 didn't have the degrees. But they knew the answer
20 the MIT guy didn't know.

21 My grandfather told me, you make a
22 decision on a person based on the actions of the
23 man, not the words. And he told me it was very
24 important in terms of personal responsibility that I
25 live my life that way; that I know exactly what my

1 words mean and I follow them up with my actions.

2 Timothy White was an individual who
3 obtained a student loan -- I'm sorry. I have
4 allergies, and I apologize to everybody for that.
5 But I'm glad it waited until today to happen.

6 Timothy White was an individual who took
7 out a couple of student loans to obtain two degrees
8 in the State of Texas. And with those degrees, he
9 began a Licensed Professional Counselor degree, for
10 which he was licensed to practice with the various
11 members of the State of Texas.

12 He started working for a while and stopped
13 going for his degree, so it took him over ten years
14 to go back to his Ph.D. During that time, he met
15 the gentleman he talked about as his spouse. He
16 moved to Dallas, he did lots of things.

17 What he didn't do was pay back those
18 student loans. That matters, folks, because the
19 State of Texas guaranteed those loans with taxpayer
20 dollars, and so they paid them back. And now the
21 State of Texas wants their money back. So to do
22 that, they hired RAB to go and make collections.

23 It is true in Texas that if the state pays
24 your student loan they have certain consequences
25 that they can take that are different than a regular

1 creditor. For example, if you don't pay your
2 student loans back, the IRS gets to keep your money.
3 That seems kind of fair, because if you owe money to
4 the government, they shouldn't be giving you money
5 as a tax return.

6 Another example is, if you don't pay your
7 student loans, then you can't practice as a doctor,
8 a lawyer, a professional counselor; it makes sense.
9 You shouldn't profit off of Texas taxpayers and at
10 the same time refuse to pay money back that you owe.

11 Last but not least, they can keep you from
12 getting your degree if you have not paid your
13 student loans. If you don't pay your car loan back,
14 you don't get to keep the car, so that makes a lot
15 of sense to me.

16 I would submit to you that this case isn't
17 about attempted calls to his employer or even
18 whether or not there was a message that was left
19 that didn't include the phrase "debt collector." I
20 will submit to you that Mr. White is concerned about
21 those exact things. That matters in this case,
22 folks, because we will be talking about whether or
23 not he was actually harmed by what he says my client
24 did and what he found his circumstances in life to
25 be.

1 In the Bible, they talk about a day of
2 reckoning. You've heard the expression, when stuff
3 hits the fan. In my home town of Odessa, we say,
4 when the bar tab comes due. It means the point
5 where the consequences that you have created for
6 yourself are staring you right in the face. You
7 have to figure out what you do. That's where my
8 grandfather would come in. He would look at the
9 action of the man and not the words to figure out
10 what really happened.

11 In these specific instances, Dr. White
12 will tell you that he was worried about being fired
13 because of all of these messages that were left on
14 his work number that he was so sure someone might
15 hear, and he told you that caused him a great deal
16 of concern.

17 Folks, remember my little chart that we
18 did, this 866 number -- and by the way, you will
19 find this in Defendant's Exhibit Number 1, which is
20 the account notes for RAB, and I think we spent time
21 explaining how to read them.

22 This 866 number is Mr. White's place that
23 he went to work. And what you will find is that,
24 for each of those entries, there's an M for manual
25 dial, and you will find whether or not there was a

1 message left.

2 And folks, no messages left, save one. So
3 you have to ask yourself, was Mr. White really
4 concerned that a message, one message, would have
5 caused him to lose his job at Simple Surrogacy, or
6 was he worried that losing his license for not
7 paying his student loans, something my client had
8 nothing to do with, would in fact cause him harm?

9 Are his concerns about not being able to
10 take care of his family? Are his concerns about
11 having his outbreak in his preexisting medical
12 condition? Were those really related to these phone
13 calls, or were they related to his problems in his
14 life? I would submit to you that it is the second
15 thing.

16 There's another thing about student loans
17 that are different than other loans. You can rehab
18 them. You can -- as you heard Mr. White talk about,
19 there was a discussion about making a payment of
20 interest of \$100. And if you would pay that \$100
21 and work out a payment plan for him, he could get
22 back on track, which he apparently eventually did.

23 In this case, though, what you heard from
24 Mr. Wyatt and confirmed by Dr. White is that, when
25 he was told he would make the payment of the \$100,

1 he didn't do it. When they asked him, he told them,
2 I will call you back, he didn't do that.

3 There were actually three conversations
4 with Dr. White, all three of which he said he would
5 call them back to set up a plan, none of which he
6 did.

7 You will also hear there was a message
8 left at his home, the 214 number. By the way,
9 folks, remember this: Plaintiff's counsel suggested
10 to you that they should have been calling that
11 number all along because they would have gotten him
12 there. They left messages for him. Did he call
13 back? No. What did he do? He called a law firm
14 and spent 23 minutes in three conversations with
15 them, more than the two calls that he made to RAB.
16 So folks, what I am telling you is you look at a
17 man's actions and not his words.

18 I'm going to tell you about a few things
19 the judge will have you answer questions on. There
20 are some things in the charge called sort of
21 instructions that I think are important, and I just
22 want to emphasize a couple of them for you. I'm not
23 going to go through the whole thing, because it can
24 be a little lengthy, that's what happens in the
25 practice of law sometimes.

1 First thing is, you don't let bias or
2 prejudice inform you, and that's on page 1. That's
3 very important. The reason it begins at the very
4 beginning of the charge, you're not supposed to
5 decide who you like better and then pick that person
6 to be the winner. You are supposed to make your
7 decision based on the facts. But you can consider,
8 do they have something to gain by their testimony.

9 Recall that Dr. White testified, oh, I
10 lost a teaching position. And when I reminded him
11 that in his deposition he said it had no impact on
12 his teaching whatsoever. Could it be there might be
13 a reason for his change of testimony while sitting
14 in the courtroom and asking for money. I don't
15 know. That's a call you have to make.

16 Remember, also, that Dr. White said that
17 he hadn't seen any sort of treaters; he didn't go
18 and look for any sort of care as a result of the
19 actions that were taken here. Now he wants you to
20 believe that he had these medical conditions that
21 were inflamed, but he never talked to anyone about
22 it, even up to the time of his deposition, some nine
23 months after these alleged phone calls. So you have
24 to ask yourself, was that really a problem?

25 The other question I want you to pay some

1 attention to is actually on page 8. These are the
2 damage questions. They sort of explain what the
3 damage law is and what you should do about it. Look
4 at these really carefully. You don't get to recover
5 damages because somebody might have hurt your
6 feelings or somebody might have made you feel a
7 little bit bad about yourself or maybe they didn't
8 like what you wore that day. It has to have some
9 consequence, and you need to tie the action of what
10 the defendant did to the consequence that you are
11 claiming here.

12 In fact, it says that. In the first
13 paragraph the Court says, defendant must pay the
14 plaintiff damages for conduct that it did, not for
15 some preexisting condition. Dr. White was sick with
16 this rheumatoid illness long before my client ever
17 met him. You should not factor that as a damage to
18 my client. In fairness, he didn't say we caused his
19 illness --

20 THE COURT: Slow down just a little bit.
21 You are speeding up there. Go ahead.

22 MS. MALONE: The second thing is that you
23 should not consider things that were not the result
24 of anything my client did.

25 For example, the fact that his license

1 could be lost is a State of Texas law. It's not
2 something my client had any control over. In fact,
3 they were trying to help him keep it from happening
4 by getting him on a payment plan that would allow
5 him to rehab his loan and get back into the good
6 graces of the state. So those are things that you
7 need to consider.

8 You also have to ask yourself if there
9 were other issues in Dr. White's life that may have
10 been causing the problem. He testified that, sure,
11 you look at things like stressors in a person's
12 life, move, completion of a degree, studying to take
13 your Ph.D exams, all of those things. Those are not
14 stress/mental anguish issues that my client caused,
15 that's just part of Dr. White's life. Do not
16 include those when you make a decision about this
17 issue.

18 The other question that I wanted you to
19 spend some time looking at is, of course, Question
20 Number 1. And in Question Number 1, the issue is,
21 did my client have knowledge that Dr. White was
22 prohibited from having phone calls at his employer.
23 And let me just suggest to you, the answer to that
24 question is a simple no.

25 Folks, first of all, I'm not sure Simple

1 Surrogacy is his employee. He told you they were a
2 contract employee. We also know that he, in his
3 conversation -- you will see his notes, they are
4 documenting what the communication was. The note
5 says that he gave special permission to call his
6 home phone number and to speak with his spouse,
7 Terry, and there is discussion of POI. There is no
8 records at all to any sort of concern about whether
9 or not they could call that number.

10 Dr. White now says that he expressly told
11 the folks, don't call me at work. His deposition
12 testimony was, gosh -- and remember, he agreed to
13 this on the stand. His deposition testimony was,
14 well, I didn't want them calling me there because I
15 couldn't answer directly. Is that the same thing
16 he's saying, I'm going to get into trouble over
17 this?

18 You have to go back to the other story
19 that he's now saying. He was so concerned about
20 these messages from his employer that he might lose
21 his job, but folks, there's only one message, one.
22 And I would be willing to bet you a 2/28/11 message
23 disappeared a pretty long time ago, it's no longer
24 in anybody's phone system. So that's the first
25 question, and I think the answer should be no.

1 Then from that question it will direct you
2 to answer a damage question if you believe that, in
3 fact, RAB violated that. I want to talk to you a
4 little bit about the damage question. I don't think
5 you will find that there was a violation. But if
6 you did, one of the things you're going to have to
7 find is whether or not there was an actual harm as a
8 result of that specific message or calling his
9 employer after he was told not to call.

10 You're going to have to ask yourself --
11 because he didn't say it was the phone calls making
12 my phone ring, he said the message on my machine
13 caused me to have harm with my particular employer.

14 I will submit to you that's not the case
15 here. Dr. White certainly was troubled, but he was
16 troubled about the financial consequences he found
17 his life in and the fact he could lose his license
18 because he had twice defaulted on the same group of
19 student loans.

20 Now, the other question you're going to be
21 asked is, if you do find that Dr. White, in fact,
22 has a point and that there was a violation, you
23 could find there's no actual damages. And you could
24 say, but RAB should have done a better job, so we're
25 going to give them what the Court is calling

1 statutory damages, and that award could be up to
2 1,000.

3 I want you to think about this, folks. If
4 you look at statutory damages, the 1,000 is the
5 biggest number. But that's to encompass all kinds
6 of things, like if the debt collectors calls you bad
7 names, if they cuss you out, call you racial
8 epithets, threaten you with physical harm, threaten
9 to take your child, have you arrested. All of those
10 kinds of things are on the far end.

11 Does this fit in that category? I would
12 submit to you it does not. If there was an actual
13 communication to them that the employer wouldn't
14 allow those phone calls, I would submit to you that
15 this is something like \$100 maximum.

16 THE COURT: Two minutes.

17 MS. MALONE: I don't think you should get
18 there.

19 The other calls have to do with the
20 messages left on the machine. They say that, in
21 fact, they forgot to say there was a debt collector.
22 The judge is going to tell you that the recordings,
23 in fact, left out there was not a debt collector.
24 There is no actual damage. Dr. White didn't even
25 talk about that as being an actual harm to him, he

1 only talked about the messages on his work machine.

2 I submit to you that you give him \$2.

3 That's for the two phone calls where they were
4 returning calls, he said I knew that they were, I
5 knew why they were calling me, they just didn't say
6 the magic word, I'm a debt collector.

7 You have to ask yourself, if his complaint
8 is that they didn't say, I'm a debt collector, then
9 why are they worried about a message that they
10 didn't say "debt collector"? That's the question I
11 ask myself.

12 My grandfather would say, at the end of
13 the day, you have to look at what a person's actions
14 are and what their words are and match them up.
15 Instead of working out his problem, Dr. White called
16 his lawyer. Instead of paying \$100 and getting on
17 track, Dr. White called a lawyer. And he may be
18 doing right now, but, folks, for a long time he
19 didn't, and Texas taxpayers paid the bill for him.

20 Thank you.

21 THE COURT: Thank you, Ms. Malone.

22 Mr. Radbil?

23 MR. RADBIL: May I approach briefly, Your
24 Honor?

25 THE COURT: Approach the bench.

1 (The following discussion held at the
2 bench:)

3 THE COURT: Go ahead.

4 MR. RADBIL: So we heard a statement about
5 Mr. White profiting off the State of Texas, and I
6 think that opens the door for -- she alleged that he
7 was profiting off the State of Texas. So does that
8 open the door for me to argue the actual damages --

9 THE COURT: I don't understand what that
10 means. What do you want to say?

11 MR. RADBIL: I want to say that she's
12 alleging that he profited somehow off the State of
13 Texas intentionally when, in fact, this whole ordeal
14 caused him to pay 40,000 more.

15 THE COURT: That has to do with this idea
16 that Ms. Malone brought up yesterday that the
17 damages were limited by virtue of the pretrial
18 disclosures, and you're trying -- and this is what
19 the problem is.

20 MS. MALONE: I think that's what he's
21 saying. I didn't say that.

22 THE COURT: I think all she said was
23 argument and not as a fact, and I won't permit you
24 to go into that. Okay?

25 (Bench conference concluded.)

1 THE COURT: Go ahead, Mr. Radbil.

2 MR. RADBIL: Only a few things to add,
3 ladies and gentlemen. It will be very brief.

4 Dr. White hasn't attempted to profit off
5 of the State of Texas in any way. He's worked hard.
6 And for however many years that he was supposedly
7 doing wrong, the times that he was in default he was
8 making payments directly to Texas Guaranteed because
9 Regional Adjustment Bureau would not work out an
10 arrangement with him despite his efforts to work out
11 such an arrangement. And I think the second --

12 THE COURT: Could you say that again?

13 MR. RADBIL: And I think the second year
14 he was paying 400-some-dollars per year. Thankfully
15 everything is back on track now.

16 But the statutory damages that Ms. Malone
17 was talking about are to be based on specific
18 factors that are set forth in the instructions.

19 So there's extreme cases of debt
20 collection abuses, certainly, and extreme cases of
21 debt collection abuses can cause actual damages.
22 But the specific factor for the additional statutory
23 factors don't have anything do with things that she
24 mentioned.

25 And everybody here is perfectly capable of

1 going through these instructions. The reason we
2 have them and take care to write them, together with
3 the judge, is so that they are understandable. I
4 think they are self-explanatory.

5 Dr. White, again, has been legitimately
6 damaged by wrongful debt collection conduct. Nobody
7 is saying he didn't default. Nobody is saying there
8 are not consequences. He's paid consequences for
9 defaulting. But you cannot collect debt in an
10 unlawful manner. You cannot threaten to strip
11 someone of their degrees, and you cannot call them
12 at their place of employment and jeopardize their
13 job when they tell you not to call them there.

14 He's not asking for anything more than
15 what the ladies and gentlemen of the jury think is
16 fair. So with that, I will conclude.

17 THE COURT: Thank you, Mr. Radbil.

18 Ladies and gentlemen, I know you haven't
19 physically viewed each of these exhibits, but
20 everything admitted will go back to you when we
21 finish the jury instructions. This particular
22 document, which I believe is -- according to
23 Ms. Malone, I agree is reflected, at least in part
24 in the exhibits, is actually a demonstrative
25 exhibit, so it's not something that will go back to

1 the jury room.

2 Without further ado, I will have the jury
3 instructions passed to each one of you, and I will
4 get Mr. Everett -- thank you.

5 Ladies and gentlemen of the jury, these
6 are your instructions, starting with the general
7 instruction on page 1:

8 You have heard the evidence in this case,
9 and I will now instruct you on the law that you must
10 apply. It is your duty to follow the law as I give
11 it to you. On the other hand, you, the jury, are
12 the judges of the facts.

13 Do not consider any statement that I have
14 made in the course of trial or make in these
15 instructions as an indication that I have any
16 opinion about the facts of this case.

17 You have heard the closing arguments of
18 the attorneys. Statements and arguments of the
19 attorneys are not evidence and are not instructions
20 on the law. They are intended only to assist the
21 jury in understanding the evidence and the parties'
22 contentions. Answer each question from the facts as
23 you find them. Do not decide who you think should
24 win and then answer the questions accordingly. Do
25 not let bias, prejudice, or sympathy play any part

1 in your deliberations.

2 A corporation and all other persons are
3 equal before the law and must be treated as equals
4 in a court of justice. Your answers and your
5 verdict must be unanimous.

6 Burden of proof. You must answer all
7 questions from a preponderance of the evidence. By
8 this is meant the greater weight and degree of
9 credible evidence before you. In other words, a
10 preponderance of the evidence just means the amount
11 of evidence that persuades you that a claim is more
12 likely so than not so.

13 In determining whether any fact has been
14 proved by a preponderance of the evidence in this
15 case, you may, unless otherwise instructed, consider
16 the testimony of all witnesses, regardless of who
17 may have called them, and all exhibits received in
18 evidence, regardless of who may have produced them.
19 If the proof fails to establish any central part of
20 the plaintiff's claim by a preponderance of the
21 evidence, you should find for the defendant as to
22 that claim.

23 Witness testimony. In determining the
24 weight to give to the testimony of a witness, you
25 should ask yourself whether there was evidence

1 tending to prove that the witness testified falsely
2 concerning some important fact or whether there was
3 evidence that at some other time the witness said or
4 did something or failed to say or do something that
5 was different from the testimony the witness gave
6 before you during the trial.

7 You should keep in mind, of course, that a
8 simple mistake by a witness does not necessarily
9 mean that the witness was not telling the truth as
10 he or she remembers it, because people may forget
11 some things or remember other things inaccurately.
12 So if a witness has made a misstatement, you need to
13 consider whether that misstatement was an
14 intentional falsehood or simply an innocent lapse of
15 memory, and the significance of that may depend on
16 whether it has to do with an important fact or only
17 an unimportant detail.

18 Evidence. While you should consider only
19 the evidence in this case, you are permitted to draw
20 such reasonable inferences from the testimony and
21 exhibits as you feel are justified in the light of
22 common experience. In other words, you may make
23 deductions and reach conclusions that reason and
24 common sense lead you to draw from the facts that
25 have been established by the testimony and the

1 evidence in the case.

2 The testimony of a single witness may be
3 sufficient to prove any fact even if a greater
4 number of witnesses may have testified to the
5 contrary if, after considering all of the other
6 evidence, you believe that single witness.

7 There are two types of evidence that you
8 may consider in properly finding the truth as to the
9 facts in the case. One is direct evidence, such as
10 the testimony of an eyewitness. The other is
11 indirect or circumstantial evidence, the proof of a
12 chain of circumstances that indicates the existence
13 or nonexistence of certain other facts.

14 As a general rule, the law makes no
15 distinction between direct and circumstantial
16 evidence, but simply requires that you find the
17 facts from a preponderance of all the evidence, both
18 direct and circumstantial.

19 During the course of this trial, you've
20 heard counsel make objections to evidence. It is
21 the duty of the attorneys on each side to object
22 when the other side offers testimony or other
23 evidence that the attorney believes is not properly
24 admissible.

25 You should not draw any inference against

1 an attorney or his client because the attorney has
2 made objections. Upon allowing testimony or other
3 evidence to be introduced over the objection of any
4 attorney, the Court does not indicate any opinion as
5 to the weight or effect of such evidence.

6 You are the sole judges of the credibility
7 of all witnesses and the weight and effect of all
8 evidence. When the Court has sustained an objection
9 to a question addressed to a witness or to the
10 introduction of any other evidence, you must
11 disregard the question entirely and may draw an
12 inference -- may draw no inference from the wording
13 of it or speculate as to what the witness would have
14 said if the witness had been permitted to answer.

15 From time to time during the trial, it may
16 have been necessary for me to talk to the attorneys
17 out of your hearing, either by having a conference
18 at the bench while you were present in the courtroom
19 or by calling a recess. The purpose of these
20 conferences was not to keep relevant information
21 from you, but to decide how certain evidence is to
22 be treated under the Rules of Evidence and to avoid
23 confusion and error.

24 Cautionary instruction. I will give you
25 instruction regarding damages at certain points in

1 these instructions. You should not interpret the
2 fact that I have given instructions about damages as
3 an indication in any way that I believe a party
4 should or should not win this case.

5 Definitions. You are instructed that the
6 following definitions apply throughout these jury
7 instructions. White refers to Plaintiff,
8 Dr. Timothy White. RAB refers to Defendant,
9 Regional Adjustment Bureau.

10 Joint stipulated facts. The parties have
11 agreed or stipulated to the following facts. That
12 means that both sides agree that these are facts.
13 You must therefore treat these facts as having been
14 proved:

15 RAB is under contract with Texas
16 Guaranteed to provide debt collection services in
17 connection with TG student loan portfolio.

18 In August 2010, TG placed Dr. White's
19 student loan debt with RAB for collection.

20 RAB maintains business records in the form
21 of account notes documenting RAB's communications
22 and attempting communications with Dr. White.

23 POE stands for place of employment or work
24 number.

25 RAB is a debt collector within the meaning

1 of the Fair Debt Collection Practices Act.

2 Dr. White is a consumer within the meaning
3 of the Fair Debt Collection Practices Act.

4 Moving, then, to the claims of the
5 parties.

6 Plaintiff Dr. Timothy White claims that
7 Defendant Regional Adjustment Bureau, Inc., violated
8 Section 1692c(a)(3) of the Fair Debt Collection
9 Practices Act, (FDCPA) 15 U.S.C. 1692 c(a)(3) when
10 RAB called White's place of employment, Simple
11 Surrogacy, after White informed RAB that it was
12 against his employer's policy to do so. RAB denies
13 that White ever informed RAB that it could not call
14 Simple Surrogacy. RAB also denies that Simple
15 Surrogacy is plaintiff's employer.

16 To prevail on this claim, White must prove
17 by a preponderance of the evidence the following
18 elements in dispute: One, that Simple Surrogacy was
19 White's employer; and two, RAB knew or had reason to
20 know that it could not contact White at Simple
21 Surrogacy.

22 In answering Question Number 1, you are
23 instructed as follows: The Fair Debt Collection
24 Practices Act prohibits a debt collector from making
25 communications regarding debt collection to a

1 consumer at the consumer's place of employment if
2 the debt collector knows or has reason to know if
3 the consumer's employer prohibits the consumer from
4 receiving such communications.

5 This is your first question.

6 Number 1: Did RAB violate 15 U.S.C.
7 Section 1692c(a)(3) -- which, just for clarity, is
8 the Federal Debt Collection Procedures section
9 that's in reference with the elements of proof on
10 the previous page -- by calling White at his place
11 of employment after RAB knew or had reason to know
12 that White's employer prohibited White from
13 receiving such communications?

14 Instruction: If so, answer yes;
15 otherwise, answer no. There is a place for your
16 answer and then instructions as to where to go next
17 depending on your answer. So let's just go
18 chronologically through.

19 Next page. Damages. General Instructions
20 on Damages. The questions that follow apply to
21 awarding damages to White if you believe he is owed
22 damages under the law. You should not interpret the
23 fact that I have given instructions about the
24 plaintiff's damages as an indication in any way that
25 I believe that the plaintiff should or should not be

1 awarded damages in this case.

2 Plaintiff seeks two types of damages in
3 this case: Actual damages and statutory damages.
4 Actual damages are actual losses that the plaintiff
5 suffered due to the defendant's conduct. Statutory
6 damages are damages that are permitted by federal
7 law regardless of whether the plaintiff suffered
8 actual damages. Statutory damages are separate and
9 distinct from actual damages.

10 Now we move into the definition of actual
11 damages. If you find that the defendant is
12 liable -- and we are talking now about on this one
13 question that I referred to earlier -- you must
14 award the amount that you find by a preponderance of
15 the evidence as full and just compensation for all
16 of the plaintiff's damages. You will also be asked
17 to determine if the defendant must pay the plaintiff
18 damages for conduct that this Court determined to be
19 a violation of federal and state law prior to trial.

20 Let me just clarify this for a minute.
21 Prior to trial, it was determined as a matter of law
22 that certain violations occurred. And as I will
23 explain to you all later, don't be confused by that,
24 it is still completely the jury's prerogative as to
25 whether or not you decide the evidence warrants

1 damages or not as to those particular claims. And I
2 will explain that more later, I just don't want you
3 to be confused about that.

4 Compensatory damages are not allowed as a
5 punishment against a party. Such damages cannot be
6 based on speculation, for it is only actual damages,
7 what the law calls compensatory damages, that are
8 recoverable.

9 However, compensatory damages are not
10 restricted to actual loss of time or money. They
11 include both the mental and physical aspects of
12 injury, tangible and intangible. They are an
13 attempt to make the plaintiff whole or to restore
14 him to the position he would have been if the
15 violation had not happened.

16 You should consider the following elements
17 of damages to the extent you find that the plaintiff
18 has established compensatory damages by a
19 preponderance of the evidence: Physical pain and
20 suffering, including physical disability,
21 impairment, and inconvenience, and the effect of the
22 plaintiff's injuries and inconvenience on the normal
23 pursuits and pleasures of life; mental anguish,
24 feelings of economic insecurity caused by
25 disability; income loss in the past; impairment of

1 earning capacity or ability in the future, including
2 impairment and the normal progress in the
3 plaintiff's earning capacity due to his physical
4 condition; postmedical expenses; the reasonable
5 value, not exceeding actual cost to the plaintiff,
6 of medical care that you find from the evidence will
7 be reasonably certain to be required in the future
8 as a proximate result of the injury in question.

9 Some of these damages, such as mental or
10 physical pain and suffering, are intangible things
11 about which no evidence of value is required. In
12 awarding these damages, you are not determining
13 value, but you show award an amount that will fairly
14 compensate the plaintiff for his injuries. Again,
15 you should not interpret the fact that I have given
16 instructions about plaintiff's damages as an
17 indication in anyway that I believe -- the Court --
18 believes that the plaintiff should or should not be
19 awarded damages in this case.

20 The questions regarding what damages, if
21 any, the jury finds are justified in this case are
22 divided into two parts: First are questions
23 regarding damages that apply only if you answered
24 yes to Question Number 1. And that is regarding
25 RAB's liability as to that one allegation of a

1 violation we talked about earlier in question one.

2 The second section relates to what
3 damages, if any, the jury finds are justified as to
4 certain claims determined prior to trial to have
5 occurred as a matter of law.

6 A. Damages for claims determined by the
7 jury in Question Number 1.

8 Federal law permits a plaintiff to recover
9 actual and statutory damages for violations of the
10 FDCPA. The jury must determine whether White is
11 entitled to recover actual damages and statutory
12 damages. It's nice to see one blank page with one
13 word on it.

14 Question Number 2: Answer only -- and you
15 will see as you answer Question Number 1 where it
16 takes you. It may take you here, depends on your
17 answer.

18 Question Number 2: Answer only if you
19 answered yes to Question Number 1; otherwise,
20 proceed to Question Number 4 on page 14.

21 Question: Did White suffer actual damages
22 which may include out-of-pocket expenses, personal
23 humiliation, embarrassment, mental anguish and/or
24 emotional distress due to any of the conduct
25 described in Question Number 1?

1 And there's a spot for your answer, yes or
2 no. And then it gives you an amount if you say yes
3 as to the amount of actual damages.

4 Now, we move to page 12.

5 Question 3: Answer only if you answered
6 yes to Question Number 1; otherwise, proceed to
7 Question Number 4 on page 14.

8 And again, this is the -- what we're
9 talking about here and the reason there are two
10 questions on Question Number 1 have to do with the
11 different kinds of damages to consider. First was
12 actual, and now we are talking about statutory as to
13 that first question.

14 Federal law also provides for statutory
15 damages, which are separate from any actual damages,
16 for pecuniary loss or mental anguish of up to \$1,000
17 if you answered yes to Question Number 1. What
18 amount of statutory damages, if any, do you award to
19 White up to a maximum of \$1,000.

20 Let's move to the second section we talked
21 about: Damages for liabilities on claims determined
22 as a matter of law prior to trial.

23 You are instructed that prior to this
24 trial it was determined as a matter of law that
25 certain actions by RAB violated provisions of the

1 Federal Debt Collection Procedures Act (FDCPA) and
2 the Texas Debt Collection Procedures Act (TDCPA).

3 Specifically, it has been determined that
4 RAB violated FDCPA, 15 U.S.C. Section 1692d(6) and
5 1692e(11), which sections prohibit a debt collector
6 from placing calls without meaningful disclosure of
7 the caller's identity and failing to disclose that
8 the subsequent communications are from a debt
9 collector, when it contacted White on February 17,
10 2011, and March 11, 2011, without identifying its
11 business name or stating that the call was from a
12 debt collector.

13 It has been further determined -- again,
14 as matter of law prior to trial -- that RAB violated
15 the TDCPA, that's Texas Finance Code, Sections
16 392.304(a)(4) and (a)(5)(B), which prohibit failing
17 to disclose the name of the person to whom the debt
18 has assigned or is owed and failing to disclose that
19 a communication was made from a debt collector when
20 it contacted White on February 17, 2011, and
21 March 11, 2011, without identifying its business
22 name or stating that the call was from a debt
23 collector. It is up to the jury to determine the
24 amount of damages, if any, White should receive for
25 RAB's violations of these statutes.

1 And when I say, "violations of these
2 statutes," again, ladies and gentlemen, I am
3 referring to these we talked about that were looked
4 at and resolved as a matter of law prior to trial.

5 Again, you should not interpret the fact
6 that I have given instructions about the plaintiff's
7 damages as an indication in any way that I, the
8 Court, believes plaintiff should or should not be
9 awarded damages in this case.

10 Let me move to Question Number 4. As I
11 mentioned, prior to trial, page 14, it was
12 determined as a matter of law that RAB violated the
13 FDCPA, 15 U.S.C. Section 1692d(6) when it contacted
14 White on February 17, 2011, and March 11, 2011,
15 without identifying its business name or stating
16 that the call was from a debt collector.

17 Question is: Did White suffer actual
18 damages, which may include out-of-pocket expenses,
19 personal humiliation, embarrassment, mental anguish,
20 and emotional distress due to any of the conduct
21 described in Question Number 4. And there's a spot
22 for your answers and description as to what each
23 answer for damages will show.

24 Moving, then, to Question Number 5 on page
25 15. And this gets to the Federal Debt Collection

1 Act section that we talked about.

2 Prior to this trial, it was determined as
3 a matter of law that RAB violated the FDCPA at 15
4 U.S.C. Section 1692e(11) when it contacted White on
5 February 17, 2011, and March 11, 2011, without
6 identifying its business name or stating that the
7 call was from a debt collector.

8 The question is: Did White suffer actual
9 damages which may include out-of-pocket expenses,
10 personal humiliation, embarrassment, mental anguish,
11 and emotional distress due to any of the conduct
12 described in Question Number 5.

13 And there's a place for your answer,
14 instructed to answer yes or no. And then if you
15 answered yes, a spot at each place for your
16 calculation on the damages question.

17 Question Number 6: Prior to this trial,
18 it was determined as a matter of law that RAB
19 violated the TDCPA, Texas Finance Code 392.304(a)(4)
20 when it contacted White on February 17, 2011, and
21 March 11, 2011, without identifying its business
22 name or stating that the call was from a debt
23 collector.

24 The question: Did White suffer actual
25 damages, which may include out-of-pocket expenses,

1 personal humiliation, embarrassment, mental anguish,
2 and emotional distress due to any of the conduct
3 described in Question Number 6. And then there is a
4 spot for your answer, yes or no.

5 Just to avoid confusion -- and these
6 statutes can be confusing. I mentioned that there
7 were two statutes determined as a matter of law
8 before court to have been violated and the fact that
9 there are four questions just indicates that there
10 are four separate situations, two under each
11 statute, that you will be looking at.

12 Question Number 7: Prior to this trial,
13 it was determined as a matter of law that RAB
14 violated the TDCPA, Texas Finance Code,
15 Section 392.304(a)(5)(b) when it contacted White on
16 February 17, 2011, and March 11, 2011, without
17 identifying its business name or stating that the
18 call was from a debt collector.

19 Question: Did White suffer actual
20 damages, which may include out-of-pocket expenses,
21 personal humiliation, embarrassment, mental anguish,
22 and emotional distress due to any of the conduct
23 described in Question 7. And there is a place for
24 your answer, yes or no, and a place, if necessary,
25 to into the damages.

1 Finally, ladies and gentlemen, the
2 instructions on deliberations.

3 The fact that I have given you these
4 instructions about a particular claim or defense or
5 that I have not so instructed you should not be
6 interpreted in any way as an indication that the
7 Court has any opinion as to the merits of the
8 parties' claims and/or defenses.

9 In order to return a verdict, your verdict
10 must be unanimous. Everyone must agree. It is your
11 duty as jurors to consult one another and to
12 deliberate with a view towards reaching an
13 agreement.

14 Each of you must decide the case for
15 yourself, but only after an impartial consideration
16 with each other of all the evidence in the case.

17 In the course of your deliberations, do
18 not hesitate to reexamine your own view and change
19 your opinion if convinced it is erroneous. Do not,
20 however, surrender your honest conviction as to the
21 weight or effect of the evidence solely because of
22 the opinion of other jurors or for the mere purpose
23 of returning a verdict.

24 Remember, at all times, that you are not
25 partisans, you are judges, judges of the facts.

1 Your sole interest is to seek the truth from the
2 evidence in the case.

3 As soon as I finish reading this charge,
4 you will retire to the jury room. I will send you
5 the exhibits that have been admitted into evidence.

6 You will first select one member of your
7 jury as the presiding juror. The presiding juror
8 will preside over your deliberations and speak on
9 your behalf here in court.

10 Do not deliberate unless all members of
11 the jury are present in the jury room. In other
12 words, if one or more of you go out to lunch
13 together or together outside the jury room, do not
14 discuss the case.

15 When you have reached unanimous agreement
16 as to your verdict, the presiding juror shall fill
17 in your answers to the questions on this copy of the
18 charge, which is going to be the one with my
19 signature in blue, and sign and date the last page
20 of the charge, which will indicate that you have
21 reached a verdict. And that's going to be the
22 verdict form that's in this copy. I don't know if
23 you got one or not, but this will be the one. The
24 Court security office will then deliver the verdict
25 to me.

1 The Court will honor the schedule you set
2 for your deliberations and your requests for breaks.
3 It's completely up to you, ladies and gentlemen,
4 what schedule you want to set, how late you want to
5 work, when you want to come in, you just let us
6 know.

7 From time to time I may communicate with
8 you concerning your schedule. This is done
9 primarily for the purpose of anticipating the
10 Court's staffing needs and not in any way intended
11 to suggest that your deliberations should be
12 conducted at a different pace or a different
13 schedule.

14 During the trial, the court reporter made
15 a verbatim record of the proceedings. And this is a
16 really important part of the instructions. The
17 court rules do not provide the testimony to be
18 produced for the jury in written form or for
19 testimony to be read back to the jury as a general
20 aid in refreshing the jury's memories.

21 I say this is because, so often over the
22 years I have been doing this, the note will come out
23 that we want to see the testimony of such a witness.
24 And the response will be that there's got to be a
25 dispute that's reflected in the note over something

1 material to the case before I provide the testimony.
2 It takes a long time to do that. It's not that you
3 can't get it, but it's got to be more than a request
4 for the testimony, so I don't waste your time.

5 In some limited circumstances, under those
6 circumstances as I have mentioned, the Court may
7 direct the court reporter to read testimony back to
8 the jury in open court. This is done, however, only
9 when the jury certifies it disagrees as to the
10 testimony of a particular witness and identifies the
11 specific testimony in dispute.

12 I can't communicate with you, as you all,
13 know, back and forth in any fashion. If you need to
14 communicate with me, then your presiding juror
15 should reduce the message to writing, sign it, and
16 pass the note to the court security officer, who
17 will bring it to my attention.

18 I will then respond as promptly as
19 possible, either in writing or by asking you to
20 return to the courtroom so I can address you orally.

21 If you do send a message or ask a question
22 in which you indicate that you are divided, never
23 state or specify your numerical division at any
24 time.

25 After you have reached a verdict, you are

1 not required to talk to anyone about the case unless
2 the court orders otherwise.

3 Ladies and gentlemen, thank you for your
4 patience today. I'm going to send you back there.
5 You're on your own. I will send you these original
6 jury instructions, and then we will get the exhibits
7 back to you. All rise, please.

8 (Jury leaves courtroom)

9 THE COURT: If you all will get those
10 exhibits together. This is my normal way of doing
11 this: Everybody get the preadmitted and admitted
12 exhibits. Everybody look over them, and then let
13 Ms. Archuleta know when you are ready, and I will
14 put on the record that both sides have looked at and
15 agreed to exactly what's going back there. It's not
16 a huge issue in this case, but it's always important
17 to check. So I will be looking to hear from you in
18 five minutes or so.

19 Is there anything before we adjourn?

20 MS. MALONE: Judge, I wanted to introduce
21 you to Xerxes Martin, who is my associate who has
22 written most of these things, and I think you might
23 know his dad, E.X.

24 THE COURT: Oh, E.X. Martin; yes, you're
25 the baseball player.

1 MR. MARTIN: Former.

2 THE COURT: I have heard about you for
3 many, many years.

4 MR. MARTIN: I'm sure you have.

5 THE COURT: From your dad.

6 MS. MALONE: And he wrote like 90 percent
7 of the documents in this case, Judge, so it's always
8 nice to have a face to go with the writer.

9 MR. MARTIN: Sometimes a ghost writer.

10 THE COURT: It's nice to meet you.

11 MR. MARTIN: Nice to meet you to.

12 THE COURT: Mr. Radbil, do you want to
13 make sure we have the exhibits? Anything before we
14 adjourn?

15 MR. RADBIL: No, Your Honor.

16 THE COURT: All right.

17 (Recess taken from 4:00 to 4:24.)

18 THE COURT: You all probably have an idea
19 of why I require everyone to go through the
20 exhibits, because there is not always an agreement.

21 So are we in agreement, Mr. Radbil?

22 MR. RADBIL: Yes, Your Honor.

23 MS. MALONE: Yes, ma'am.

24 THE COURT: And what I have in my records
25 are preadmitted by agreement of the plaintiff were

1 Defense 1 and 6; admitted at trial were Defense 5
2 and 2.

3 Preadmitted by agreement of the plaintiff
4 on defense were 6, 7, 14, 15 and 17; admitted by
5 offer, it was Plaintiff's 10.

6 MS. MALONE: Your Honor, 17 was withdrawn.

7 THE COURT: 17 was withdrawn, I have that.

8 MS. MALONE: So it's 6, 7, 14, 15 and 10
9 by plaintiff.

10 THE COURT: 6, 7, 14 and 15, and 17 was
11 withdrawn.

12 MS. MALONE: That matches up with the
13 binders, Judge.

14 THE COURT: Let's send them back.

15 (Court in recess at 4:25.)

16 (Jury requested at 5:00 to return for
17 deliberations at 8:30 a.m. the following day.)

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C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify
that the foregoing is a transcript from the record
of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees
format comply with those prescribed by the Court and
the Judicial Conference of the United States.

This 21st day of March 2013.

s/Shawnie Archuleta
Shawnie Archuleta CCR No. 7533
Official Court Reporter
The Northern District of Texas
Dallas Division

My CSR license expires: December 31, 2013

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